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LIBELANT'S EXHIBITS:

1—Identical with Stipulation of Facts, printed herein at pages 71 to 78, marked in evidence at folio 257.

2—Record on the hearings before the Committee of Commerce of the Senate on Bill S-1152 (omitted pursuant to stipulation), marked in evidence at folio 261.

3—Report of Committee of Commerce of the Senate after hearings (omitted pursuant to stipulation), marked in evidence at folio 261.

4—Report of the hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives (omitted pursuant to stipulation), marked in evidence at folio 262.

5—Report of the Committee of the Merchant Marine and Fisheries after hearings (omitted pursuant to stipulation), marked in evidence at folio 263.

6—Report of the delegates of the United States to the International Conference on Maritime Law (omitted pursuant to stipulation), marked in evidence at folio 264.

7—Senate Executive Report No. 2, approving the International Convention for the Unification of Rules relating to bills of lading (omitted pursuant to stipulation), marked in evidence at folio 265.

8—Portion of Congressional Record covering the date April 1, 1935, Proceedings in the Senate (omitted pursuant to stipulation), marked in evidence at folio 265.

9—Statement in tabular form from Mr. Knauth's book as to ratifications and adherences to the convention with respect to the Hague Rules and cargo liability (omitted pursuant to stipulation), marked in evidence at folio 267.

10—Portions of Mr. Benedict's work on American Admiralty (omitted pursuant to stipulation), marked in evidence at folio 267.

11—British Carriage By Seas Act in short form (omitted pursuant to stipulation), marked in evidence at folio 272.

12—Canadian Water Carriage Goods Act, 1936 (omitted pursuant to stipulation), marked in evidence at folio 272.

13—Page 319, et seq., of Bulletin No. 65 of the International Committee Gottenborg Conference (omitted pursuant to stipulation), marked in evidence at folio 273.

INTERVENORS' EXHIBITS:

A and B—Excerpts from the Hearings of the subcommittee on Foreign Relations of the United States Senate, 75th Congress, relating to the Collision Convention of 1910, hearings in 1938 (omitted pursuant to stipulation), marked in evidence at folio 276.

C—Excerpt from the Maritime Law Committee of the International Law Association, containing the text of the Hague Rules, 1922, as amended at the London Conference (omitted pursuant to stipulation), marked in evidence at folio 279.

D—Merchant Shipping Act of 1911 (omitted pursuant to stipulation), marked in evidence at folio 279.

E—Excerpt from the proceedings of the Maritime Law Committee at The Hague in 1921, pages 31 to 34 inclusive (omitted pursuant to stipulation), marked in evidence at folio 280.

F—Report of the 30th Conference, Internationl Law Association, Volume II (omitted pursuant to stipulation), marked in evidence at folio 282.

Docket Entries in United States of America Action (A 126-101).

UNITED STATES DISTRICT COURT,

Southern District of New York.

Title of Case	Attorneys
United States of America as owner of the S. S. "Nathaniel Bacon", and as bailee of her cargo,	United States Attorney
—against—	
Motor vessel "Esso Belgium", her engines, boilers, tackle, etc.	Kirlin Campbell Hickox Keating & McGrann 120 Broadway, New York, N. Y. Kirlin, Campbell, Hickox & Keating 120 Broadway, New York 5, N. Y. (Successor proctor)
Atlantic Mutual Insurance Company, et al. (4-6-43)	Bigham, Englar, Jones & Houston 99 John Street New York, N. Y.

1942			
Dec	2	Filed libel	
Dec	24	"	Stip. for costs ($250.— U. S. Guar. Co.)
Dec	24	"	Claim of Belgian Overseas Transports S. A. as owner of M/S "Esso Belgium" KCHK&M
Dec	24	"	Answer of Belgian Overseas Transports S. A. KCHK&M

Docket Entries in United States of America Action (A 126-101).

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1943			
Apr	6	Filed	Order permitting Atlantic Mutual Insurance Co., et al. to file intervening petition. Hulbert, *J.*, and intervening petition BEJ&H
Apr	8	"	Stipulation for intervening Petitioners' Costs ($250.— Ind. Ins. Co. of N. A.)
Apr	27	"	Answer of Belgian Overseas Transports S. A. to intervening petition KCHK&M
June	10	"	Letter from Dept. of Justice—Form "C"
Nov	23	"	Depositions of Otto Skaalon, et al.—M'l'd notices to procs. 11/24/43
1944			
Apr	7	"	Order amending intervening petition to include Hanover Fire Insurance Co. as intervening petitioner. Caffey, *J.* BEJ&H
1945			
Jan	10	"	Notice of Change of firm name from Kirlin, C. H. K. & McG. to Kirlin, Campbell, Hickox & Keating

5

6

1947			
Feb	10	"	Stipulation
1948.			
June	8	"	Consent & order restoring this case and A126-167 to foot of Admiralty Day Calendar. Goddard, *J.*
Dec	21	Trial	Begun with (A 126-167) Before Medina, *J.*
Dec	22	"	Cont'd

Docket Entries in United States of America Action (A 126-101).

1949		
Jan 11	Trial Cont'd	
Jan 12	" " & concluded. Decision Reserved	
1950		
May 9	Filed opinion #18,701. Medina, J.— (See opinion)	
June 14	" One volume of steno's minutes. (Also in A 126-167)	
Sept 11	" Interlocutory decree consolidating A 126-167 with this case and referring matter of damages to Richard T. O'Conpell as Commissioner. Medina, J. (Also in A 126-167)	
Sept 21	" Assignment of errors. (Also in A 126-167) BEJ&H.	
Sept 21	" Cost bond on appeal ($250.— Indem. Ins. Co. of N. A.) (Also A 126-167)	
Sept 21	" Notice of appeal and allowance. Ryan, J. (Also in A 126-1 Clerk's Fees: Defendant—5 (BEJ&H)	

Docket Entries in Belgian Overseas Transports Action (A 126-167).

UNITED STATES DISTRICT COURT,

Southern District of New York.

Title of Case	Attorneys
Belgian Overseas Transports, S. A., as owner of M/S "Esso Belgium", on its own behalf and also on behalf of War Shipping Administration,	Kirlin Campbell Hickox & Keating 120 Broadway, New York, N. Y
vs.	
United States of America, owner of the S. S. "Nathaniel Bacon",	United States Attorney
Farr Sugar Corporation, et al. (Impleaded 3-6-44)	Bigham, Englar, Jones & Houston 99 John Street New York, N. Y.

1942		
Dec 24	Filed Libel & Stip. for costs ($250.— U. S. 5— Guarantee Co.)	
Dec 28	"	Affidavit of service of copy of libel
1943		
June 25	"	Consent & order amending libel. KCHK&M
1944		
Feb 14	"	Order amending libel upon consent. Bondy, J.
Mar 6	"	Answer
Mar 6	"	Petition impleading Farr Sugar Corp. et al. U. S. Atty.
Aug 30	"	Stip. for costs. ($100.— Indem. Ins. Co. of N. Am.)

Docket Entries in Belgian Overseas Transports Action (A 126-167).

			13
1944			
Aug 30	Filed	Notice of Appearance of Farr Sugar Corp'n. BEJ&H	
Nov 24	"	Stip. for costs ($100.— Indem. Ins. Co. of N. Amer.)	
Nov 24	"	Answer of Farr Sugar Corp. and American Spirits, Inc. to impleading petition BEJ&H	
1945			
Jan 10	"	Notice of Change of Firm Name from Kirlin, C. H. K. & McG. to Kirlin, Campbell, Hickox & Keating	14
Jan 31	"	Letter from the Dept. of Justice—Form "C"—	
Sep 7	"	Stip. & order marking case off calendar. Knox, *J.*	
1947			
Feb 10	"	Stipulation	
1948			
June 8	"	Consent & order restoring this and A 126-101 to foot of adm. day calendar. Goddard, *J.* (Filed in A 126-101)	15
Dec 21	Trial	Begun (Tried with A 126-101) Before Medina, *J.*	
Dec 22	"	Cont'd	
1949			
Jan 11	"	"	
Jan 12	"	" and concluded, Decision Reserved	
1950			
May 9	Filed	opinion #18,701. Medina, *J.* (See opinion filed in A 126-101)	

Docket Entries in Belgian Overseas Transports Action (A 126-167).

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1950

June 14	Filed	One volume of steno's minutes. (Filed in A 126-101)
Sept 11	"	Interlocutory decree consolidating this case with A 126-101 and referring matter of damages to R. T. O'Connell as Comm'r. Medina, *J.* (Filed in A 126-101)
Sept 21	"	Assignment of error. (Filed in A 126-101) BEJ&H
Sept 21	"	Cost bond on appeal ($250.— Indem. Ins. Co. of N. A.) (Filed in A 126-101)

17

Sept 21	"	Notice of appeal and allowance. Ryan, *J.* (Filed in A 126-101);

18

Libel.

19

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel of the United States of America, as owner of the steamship "Nathaniel Bacon", and as bailee of her cargo, against the motor vessel "Esso Belgium", her engines, boilers, tackle, etc., in a cause of collision civil and maritime, alleges upon information and belief and respectfully shows to this Honorable Court as follows:

First: At all the times hereinafter mentioned the libellant was, and now is, a corporation soverign and 20
owner of the S/S "Nathaniel Bacon", which vessel up to the time of the collision hereinafter mentioned was tight, staunch, strong and in all respects seaworthy.

Second: The M/V "Esso Belgium" is now, or during the pendency of process herein, will be within this district and within the jurisdiction of this Honorable Court.

Third: On the morning of November 24, 1942, in Upper New York Bay, to the eastward of the northerly end of Staten Island, the M/V "Esso Belgium" struck and collided with the S/S "Nathaniel Bacon", extensively 21
damaging the latter vessel and her cargo.

Fourth: The circumstances of the aforesaid collision were as follows: The "Nathaniel Bacon", loaded with a general cargo, lay anchored to the eastward of Tompkinsville, Staten Island. At about 7:05 A. M. she heaved anchor and with proper navigation lights burning, got under way, bound for Pier 35, North River. With her engines running at various speeds she proceeded very slowly and steadied on a course headed for Owl's Head Buoy No. 24. Daylight had not yet broken and a light

22 rain was falling. The "Esso Belgium" was observed on the "Nathaniel Bacon's" port bow showing her green light. The "Nathaniel Bacon" sounded a one-blast whistle signal and the "Esso Belgium" answered with one blast. The "Nathaniel Bacon" continued ahead and permitted a United States Army dredge, which was approaching, to cross from the "Nathaniel Bacon's" port to starboard bow and the "Bacon" passed under the stern of the dredge. Meanwhile, the "Esso Belgium", without reducing her speed or checking her headway, approached close aboard the port side of the "Nathaniel Bacon". The "Esso Bel-
23 gium" was heard to sound a three-whistle backing signal and the alarm and to let go her starboard anchor, but she continued on with headway unabated and her bow came into violent collision with the port side of the "Nathaniel Bacon" in the way of No. 3 cargo hold and forward of the bridge.

Fifth: As a result of the foregoing, a large gaping hole was cut in the port side of the "Nathaniel Bacon" and she made so much water in her holds that it became necessary for the safety of her cargo and the safety of the vessel to run her aground in the shallow water
24 of Red Hook Flats.

Sixth: Before the "Nathaniel Bacon" could be floated it became necessary to lighten her and to lighter off a large portion of her fuel and cargo.

Seventh: The aforesaid collision and damage were not caused or contributed to by any fault or neglect on the part of the libellant or of the officers and crew of the S/S "Nathaniel Bacon" but were caused solely by the fault and neglect of the M/V "Esso Belgium" and those aboard and in charge of her in the following, among

other, particulars which will be pointed out at the trial of this action:

1. In that those in charge of the M/V "Esso Belgium" were careless, incompetent and inattentive to their duties.

2. In that the M/V "Esso Belgium was improperly manned and equipped.

3. In failing to have a lookout properly stationed and attending to his duties.

4. In failing to navigate to pass the "Nathaniel Bacon" as the situation required.

5. In failing to direct her course to her own starboard.

6. In failing to pass under the stern of the "Nathaniel Bacon".

7. In failing to stop and reverse in time to avoid collision.

8. In failing to make due allowance for wind and tide and to take into consideration the existing circumstances.

9. In failing to navigate in compliance with the one-whistle signal exchange with the "Nathaniel Bacon".

10. In failing to keep out of the way of a privileged vessel.

11. In proceeding at an immoderate, improper and excessive speed.

12. In failing to sound proper whistle signals.

13. In failing to take any or any proper steps to avoid collision.

Libel.

Eighth: By reason of the matters aforesaid libellant and those on behalf of whom this libel is filed sustained damages which, although not yet fully ascertainable, are estimated in the sum of approximately $200,000, no part of which has been paid although duly demanded.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libellant prays that process in due form of law may issue against the M/V "Esso Belgium", her engines, boilers, tackle, etc.; that all persons having or claiming to have any interest therein may be cited to appear and answer all and singular the matters aforesaid; that libellant may have a decree for the amount of its claim, with interest and costs; that said M/V "Esso Belgium", her engines, boilers, tackle, etc., may be condemned and sold to pay the same, and that libellant may have such other and further relief as may be just.

MATHIAS F. CORREA,
United States Attorney,
Proctor for Libellant,
Office and P. O. Address,
Room 404, 45 Broadway,
Borough of Manhattan,
City of New York.

(Verified by William E. Collins, December 1, 1942.)

Answer of Claimant.

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To the Honorable the Judges of the United States District Court for the Southern District of New York

The answer of Belgian Overseas Transports S. A., claimant of M/S "Esso Belgium", to the libel of the United States of America, as owner of the steamship "Nathaniel Bacon", and as bailee of her cargo, in a cause of collision, civil and maritime, alleges upon information and belief as follows:

First: Admits that at all the times mentioned in the libel the libelant was and now is a corporation sovereign and owner of the SS "Nathaniel Bacon". Denies that it has any knowledge or information sufficient to form a belief as to each and all of the other matters alleged in the First article of the libel. 32

Second: Admits the matters alleged in the Second article of the libel.

Third: Admits that on the morning of November 24, 1942 the M/S "Esso Belgium" was in collision with the SS "Nathaniel Bacon" in Upper New York Bay, to the eastward of the northerly end of Staten Island. Denies that it has any knowledge or information sufficient to form a belief as to each and all of the other matters alleged in the Third article of the libel. 33

Fourth: Admits that the "Esso Belgium" sounded a three whistle backing signal and let go her starboard anchor. Denies that the "Nathaniel Bacon" proceeded very slowly; that the "Esso Belgium" answered with one blast; that the "Esso Belgium" approached the port side of the "Nathaniel Bacon"; that the "Esso Belgium" failed to reduce speed or check her headway and continued with her headway unabated. Denies that it has any knowledge or information sufficient to form a belief as to each and all

34 of the other matters alleged in the Fourth article of the libel.

Fifth: Denies each and all of the matters alleged in the Fifth article of the libel.

Sixth: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the Sixth article of the libel.

Seventh: Denies each and all of the matters alleged in the Seventh article of the libel, including subdivisions one to thirteenth inclusive.

35 Eighth: Admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Denies each and all of the other matters alleged in the Eighth article of the libel.

Ninth: Further answering, claimant alleges that on the morning of November 24, 1942, M/S "Esso Belgium", a twin screw motor tanker, hereinafter called the "Belgium", sailed from Pier 5, Bayonne, New Jersey in compliance with United States Naval orders. She was tight, staunch, strong and in all respects seaworthy. It was raining but the visibility was good. The wind was southeast, force
36 about 4, and the tide flood. The navigation was in charge of a duly licensed pilot, and with him on the bridge were the captain, the third officer and a qualified helmsman. On the forecastle head were the chief officer, the boatswain and a qualified lookout. The "Belgium" proceeded without incident down the Kill Van Kull and approached the Stapleton anchorage at slow speed. In the anchorage there were many vessels at anchor, stemming the flood tide and heading downstream. The area occupied by the anchored vessels extended into the main ship channel. No navigational lights of any vessels underway were observed within said area. The "Belgium" proceeded slowly, making to pass between an anchored tanker which was

lying in the main ship channel about 500 yards in a general northwesterly direction from Red Buoy No. 22, and a dredge which was working a short distance to the east of said anchored tanker. The engines of the "Belgium" were stopped as the "Belgium" approached the opening between the anchored tanker and the dredge. When the "Belgium" was near the stern of the anchored tanker, suddenly a red light and a white masthead light of a vessel underway were seen off the starboard bow, to the right of the anchored tanker, only a short distance away, and at the same moment said vessel, which proved to be the "Nathaniel Bacon", sounded a one whistle signal. The "Nathaniel Bacon" was heading out of the crowded anchorage at considerable speed, and without due precaution, on a course directly across the bows of the anchored tanker and of the "Belgium". On sighting the navigational lights of the "Nathaniel Bacon" as aforesaid, both engines of the "Belgium" were immediately put full speed astern, a three blast signal was sounded on the whistle, the starboard anchor was dropped, and the danger signal immediately sounded. The "Belgium", which had been proceeding slowly, quickly lost her headway, but the "Nathaniel Bacon" continued without reducing her speed across the bow of the anchored tanker and then across the bow of the "Belgium". The port side of the "Nathaniel Bacon", in the vicinity of the bridge, struck and seriously damaged the bow of the "Belgium" as she passed across. The "Nathaniel Bacon" continued with unabated speed and disappeared in the direction of Bay Ridge Flats. The collision occurred at about 7:20 A. M. The "Belgium" remained at anchor until about 7:55 A. M. when she moved out of the fairway to another anchorage, and thereafter returned to pier at Bayonne for examination. 37 38 39

Tenth: Said collision and the damages resulting therefrom were not caused or contributed to by any fault on the part of the claimant herein, or of the "Belgium", or

those in charge of her, or of anyone for whose acts or omissions claimant was responsible, but were wholly caused by fault and negligence on the part of the "Nathaniel Bacon", and those in charge of her, in the following respects, among others:

1. In that those in charge of her were careless and inattentive to their duties.

2. In that she failed to keep a proper lookout.

3. In that she proceeded out of the anchorage and across the main channel without regard to the presence of vessels underway in the main channel.

4. In that she navigated through and beyond the anchorage without regard to the special circumstances of the case.

5. In that she proceeded at an immoderate and excessive rate of speed.

6. In that she failed to take due precaution to avoid collision.

Eleventh: All and singular the premises are true.

WHEREFORE, claimant prays the libel herein may be dismissed with costs.

KIRLIN CAMPBELL HICKOX KEATING
& MCGRANN,
Proctors for Claimant, Belgian
Overseas Transports S. A.,
Office & P. O. Address,
120 Broadway,
Borough of Manhattan,
City of New York.

(Verified by Edwin S. Murphy, as Attorney, on April 23, 1942.)

Order Permitting Atlantic Mutual Insurance Company, et al., to Intervene.

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(A 126-101)

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Courtrooms thereof in the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 6th day of April, 1943.

Present—Honorable George Murray Hulbert,
District Judge.

United States of America, as owner of the Steamship "Nathaniel Bacon", and as Bailee of her cargo, 44
Libellant,

—against—

Motorvessel "Esso Belgium", her engines, boilers, tackle, etc.,

Belgian Overseas Transport, S. A.,
Claimant.

Atlantic Mutual Insurance Company, Federal Insurance Company, Home Insurance Company, Fidelity Phenix 45
Fire Insurance Company, Firemen's Insurance Company, Glens Falls Insurance Company, Standard Marine Insurance Company, Ltd., St. Paul Fire & Marine Insurance Company, Queen Insurance Company of America, Star Insurance Company of America, Insurance Company of North America, Fireman's Fund Insurance Company, United States Fire Insurance Company, Agricultural Insurance Company, Commercial Union Assurance Company, Ltd. and Westchester Fire Insurance Company, insurers of cargo laden on the Steamship "Nathaniel Bacon" having presented the annexed petition for leave to intervene for their own interests and those of their

46 assureds in the above entitled action, it is upon the subjoined consent and on motion of Bigham, Englar, Jones & Houston, proctors for petitioners,

ORDERED that Atlantic Mutual Insurance Company, Federal Insurance Company, Home Insurance Company, Fidelity Phenix Insurance Company, Firemen's Insurance Company, Glens Falls Insurance Company, Standard Marine Insurance Company, Ltd., St. Paul Fire & Marine Insurance Company, Queen Insurance Company of America, Star Insurance Company of America, Insur-
47 ance Company of North America, Fireman's Fund Insurance Company, United States Fire Insurance Company, Agricultural Insurance Company, Commercial Union Assurance Company, Ltd. and Westchester Fire Insurance Company have leave to intervene and file their intervening petition herein as prayed for, and that the original petition for intervention annexed hereto be filed in this action; and it is further

ORDERED that the claimant Belgian Overseas Transport, S. A., answer the allegations of the intervening petition or, in the event of their default or failure to answer herein, that a decree be entered against them for the
48 relief demanded in the petition.

HULBERT,
U. S. D. J.

We hereby consent to the entry of the foregoing order.

MATHIAS F. CORREA,
Proctor for Libellant.

By VINCENT A. CATOGGIO,
Special Asst. U. S. Atty.

KIRLIN CAMPBELL HICKOX KEATING & MCGRANN,
Proctors for Claimant.

Petition of Intervention of Atlantic Mutual Insurance Company, et al.

To the Honorable the Judges of the United States District Court for the Southern District of New York.

The Petition of Atlantic Mutual Insurance Company, Federal Insurance Company, Home Insurance Company, Fidelity Phenix Fire Insurance Company, Firemen's Insurance Company, Glens Falls Insurance Company, Standard Marine Insurance Company, Ltd., St. Paul Fire & Marine Insurance Company, Queen Insurance Company of America, Star Insurance Company of America, Insurance Company of North America, Fireman's Fund Insurance Company, United States Fire Insurance Company, Agricultural Insurance Company, Commercial Union Assurance Company, Ltd. and Westchester Fire Insurance Company, Insurers of cargo laden on the steamship "Nathaniel Bacon", intervening for their own interests and those of their assureds in the suit of United States of America, as owner of the steamship "Nathaniel Bacon", and as Bailee of her cargo, against the Motorvessel "Esso Belgium", her engines, boilers, tackle, etc., in a cause of collision, civil and maritime, alleges upon information and belief as follows:

First: Your petitioners are corporations organized and existing under and by virtue of the laws of several states of the United States or of foreign countries with offices, agents or places of business in the City of New York.

Second: On November 24, 1942, your petitioners were the insurers and their assureds were the owners and/or shippers and/or consignees of shipments of cargo which had been duly laden on the steamship "Nathaniel Bacon", on a voyage from Puerto Rico to New York City.

Petition of Intervention of Atlantic Mutual Insurance Company, et al.

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Third: Upon information and belief, the M/V "Esso Belgium" is a twin screw motor tank vessel, 480.2′ in length, 74.9′ in breadth, and 37.2′ in depth, of 10,568 gross and 5,557 net registered tonnage and was owned and operated by Belgian Overseas Transports, S. A.

Fourth: On information and belief, on the morning of November 24, 1942, the steamship "Nathaniel Bacon" laden with general cargo, including the cargo in which your libellants and their assureds are interested, lay anchored to the eastward of Tompkinsville, Staten Island.
53 Shortly after 7 A. M., she heaved anchor and with proper navigation lights burning, got under way bound for Pier 35, North River. With her engines running at various speeds, she proceeded slowly and steadied on a course headed for Owls Head Buoy #24. Daylight had not yet broken and a light rain was falling. The "Esso Belgium" was observed on the "Nathaniel Bacon's" port bow, showing her green side light. The "Nathaniel Bacon" sounded a one blast signal and the "Esso Belgium" answered with one blast. The "Nathaniel Bacon" continued ahead and permitted a United States army dredge, which was approaching, to cross from the "Nathaniel Bacon's" port
54 to starboard bow and the "Nathaniel Bacon" passed astern of the dredge. In the meantime, the M/V "Esso Belgium", without reducing her speed or checking her headway or altering her course substantially, approached close on the port side of the "Nathaniel Bacon". The "Esso Belgium" was heard to sound a three blast backing signal and alarm signal and was observed to drop her starboard anchor. The "Esso Belgium", nevertheless, continued with headway scarcely reduced and her bow came into violent collision with the port side of the "Nathaniel Bacon" in the way of #3 cargo hold forward of the bridge. As a result of the foregoing collision, a large hole was torn in the port side of the "Nathaniel Bacon" through

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which much water entered her holds and damaged cargo, including the cargo in which your petitioners are interested. Some of the cargo was also damaged by the impact of the collision. As a result of the damage sustained by the vessel, it became necessary for those in charge of the "Nathaniel Bacon" to run her aground in the shallow water of Red Hook Flats to avoid sinking of the vessel in deep water. Thereafter, in order to float the vessel, a large portion of her fuel and cargo were removed from the vessel by lighters.

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Fourth: The aforesaid collision and consequent damage to the cargo in which your petitioners and their assureds are interested were not caused or contributed to by any fault or neglect on the part of your petitioners or any person for whom your petitioners or their assureds are responsible, but were caused solely by fault and neglect on the part of the M/V "Esso Belgium" and those in charge of her, in the following, among other respects, which will be pointed out at the trial of this action.

57

1. In that those in charge of the M/V "Esso Belgium" were careless, incompetent and inattentive to their duties.
2. In that the M/V "Esso Belgium" was improperly manned and equipped.
3. In failing to have a lookout properly stationed and attentive to his duties.
4. In failing to navigate to pass the "Nathaniel Bacon" as the situation required.
5. In failing to direct her course to her own starboard.
6. In failing to pass under the stern of the "Nathaniel Bacon".

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7. In failing to stop and reverse her engines in time to avoid collision.

8. In failing to make due allowance for wind and tide and to take into consideration existing circumstances.

9. In failing to navigate in compliance with the one whistle signal blown by the "Esso Belgium" and answered by the "Nathaniel Bacon".

10. In failing to keep out of the way of the privileged
59 vessel.

11. In proceeding at immoderate, improper and excessive speed.

12. In failing to sound proper whistle signals.

13. In failing to take any or proper steps to avoid collision.

Fifth: By reason of the premises, and as a result of the said collision, there were sacrifices of the vessel and cargo made, and expenses of a general average nature incurred, for the safety of the vessel and cargo, and for
60 the purpose of minimizing the losses resulting from the collision. Upon arrival of the cargo in which your petitioners and their assureds were interested at destination, your petitioners and their assureds were called upon to give and did give general average bonds and guarantees for payment of the respective proportions of general average expenses and sacrifices properly due with respect to the shipments in which they were interested. A general average statement is in the course of preparation and in due course your petitioners or their assureds will be required to pay such proportions of the general average expenses and sacrifices.

Petition of Intervention of Atlantic Mutual Insurance Company, et al.

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Sixth: By reason of the premises, your petitioners and their assureds have sustained damage both by reason of physical injury to the shipments in which they were interested resulting from the collision, and by reason of contributions in general average to general average expenses and sacrifices of the vessel and cargo properly due from them and consequent on the collision. Your petitioners, as insurers of the aforesaid cargo, have made or will make payments to their assureds, as owners of the said cargo for damage sustained thereby resulting from the collision, and will be required to pay for the account of the assureds all or part of the proportions of 62
general average due with respect to insured cargo. By reason of such payments your petitioners have become, or will become, subrogated to the extent of such payments to the rights of the owners of such insured cargo against the M/V "Esso Belgium" or owners or other persons responsible for said loss and damage.

Seventh: By reason of the matters aforesaid, your petitioners and/or their assureds have been damaged in the sum of $200,000, as nearly as the same can now be estimated, no part of which has been paid, although pay- 63
ment thereof has been duly demanded.

Eighth: On or about December 1, 1942, a libel was filed by the United States of America, as owner of the S. S. "Nathaniel Bacon", and as bailee of the cargo laden on board, against the M/V "Esso Belgium", her engines, boilers, etc. to recover damages, including the damages of your petitioners and their assureds as hereinafter set forth.

Ninth: This petition is filed by your petitioners for their own interest, and as agents and trustees for their

64 respective assureds, and on behalf of and for the interest of all parties who may be, or may become, interested in the shipments herein referred to as their respective interests may ultimately appear.

WHEREFORE, your petitioners pray that they be allowed to intervene in this proceeding for their own interests and for the interests represented by them, and that the claimant of the M/V "Esso Belgium" be required to answer this petition, and that this Honorable Court will decree to your petitioners against the M/V "Esso Bel-
65 gium" their damages and the damages of those represented by them and that this court will grant such other and further relief to your petitioners as to the court may seem just and proper.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Petitioners,
Office & P. O. Address,
No. 99 John Street,
New York, N. Y.

66 (Verified by Lee Orton, as Assistant Treasurer of Federal Insurance Company, on April 1, 1943.)

Answer of Belgian Overseas Transports to Intervening Petition.

67

To the Honorable the Judges of the United States District Court for the Southern District of New York

The answer of Belgian Overseas Transports S. A., as claimant of M/S "Esso Belgium" and as respondent, to the intervening petition filed by Atlantic Mutual Insurance Company and others and also on behalf of any others interested in said vessel, her use and operation, in a cause of collision, civil and maritime, alleges, upon information and belief, as follows:

68

First: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the First Article of the petition.

Second: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the Second Article of the petition.

Third: Admits the matters alleged in the Third Article of the petition.

Fourth: Admits that the "Esso Belgium" sounded a three-whistle backing signal and let go her starboard anchor, and did not alter her course substantially. Denies that the "Nathaniel Bacon" proceeded slowly; that the "Esso Belgium" answered with one blast; that the "Esso Belgium" approached the port side of the "Nathaniel Bacon"; that the "Esso Belgium" failed to reduce her speed or to check her headway; that she continued with her headway scarcely reduced, and that the bow of the "Esso Belgium" came into violent collision with the port side of the "Nathaniel Bacon" in the way of No. 3 cargo hold forward of the bridge. Denies each and all of the matters alleged in that subsequent Article of the

69

70 petition also designated "Fourth", including subdivisions one to thirteenth, inclusive. Denies that it has any knowledge or information sufficient to form a belief to each and all of the other matters alleged in the Fourth Article or Articles of the petition.

Fifth: Denies each and all of the matters alleged in the Fifth Article of the petition.

Sixth: Denies each and all of the matters alleged in the Sixth Article of the petition.

71 Seventh: Denies each and all of the matters alleged in the Seventh Article of the petition.

Eighth: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the Eighth Article of the petition.

Ninth: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the Ninth Article of the petition.

72 Tenth: Further answering, claimant-respondent, alleges that on the morning of November 24, 1942, the M/S "Esso Belgium", a twin screw motor tanker, hereinafter called the "Belgium", sailed from Pier 5, Bayonne, New Jersey, in compliance with United States Naval orders. She was tight, staunch, strong and in all respects seaworthy. It was raining but the visibility was good. The wind was southeast, force about 4, and the tide flood. The navigation was in charge of a duly licensed pilot, and with him on the bridge were the captain, the third officer and a qualified helmsman. On the forecastle head were the chief officer, the boatswain and a qualified lookout. The "Belgium" proceeded without incident down the Kill

73 Van Kull and approached the Stapleton anchorage at slow speed. In the anchorage there were many vessels at anchor, stemming the flood tide and heading downstream. The area occupied by the anchored vessels extended into the main ship channel. No navigational lights of any vessels under way were observed within said area. The "Belgium" proceeded slowly, making to pass between an anchored tanker which was lying in the main ship channel about 500 yards in a general northwesterly direction from Red Buoy No. 22, and a dredge which was working a short distance to the east of said anchored tanker. The engines of the "Belgium" were 74 stopped as the "Belgium" approached the opening between the anchored tanker and the dredge. When the "Belgium" was near the stern of the anchored tanker, suddenly a red light and a white masthead light of a vessel under way were seen off the starboard bow, to the right of the anchored tanker, only a short distance away, and at the same moment said vessel, which proved to be the "Nathaniel Bacon", sounded a one whistle signal. The "Nathaniel Bacon" was heading out of the crowded anchorage at considerable speed, and without due precaution, on a course directly across the bows of the 75 anchored tanker and of the "Belgium". On sighting the navigational lights of the "Nathaniel Bacon" as aforesaid, both engines of the "Belgium" were immediately put full speed astern, a three blast signal was sounded on the whistle, the starboard anchor was dropped, and the danger signal immediately sounded. The "Belgium", which had been proceeding slowly, quickly lost her headway, but the "Nathaniel Bacon" continued without reducing her speed across the bow of the anchored tanker and then across the bow of the "Belgium". The port side of the "Nathaniel Bacon", in the vicinity of the bridge, struck and seriously damaged the bow of the "Belgium"

76 as she passed across. The "Nathaniel Bacon" continued with unabated speed and disappeared in the direction of Bay Ridge Flats. The collision occurred at about 7:20 A. M. The "Belgium" remained at anchor until about 7:55 A. M. when she moved out of the fairway to another anchorage, and thereafter returned to the pier at Bayonne for examination.

Eleventh: Said collision and the damages resulting therefrom were not caused or contributed to by any fault on the part of the claimant-respondent herein, or of the 77 "Belgium", or those in charge of her, or of anyone for whose acts or omissions claimant-respondent was responsible, but were wholly caused by fault and negligence on the part of the "Nathaniel Bacon", and those in charge of her, in the following respects, among others:

1. In that those in charge of her were careless and inattentive to their duties.

2. In that she failed to keep a proper lookout.

3. In that she proceeded out of the anchorage and across the main channel without regard to the 78 presence of vessels under way in the main channel.

4. In that she navigated through and beyond the anchorage without regard to the special circumstances of the case.

5. In that she proceeded at an immoderate and excessive rate of speed.

6. In that she failed to take due precaution to avoid collision.

Twelfth: All and singular the premises are true.

Answer of Belgian Overseas Transports to Intervening Petition.

79

WHEREFORE, claimant-respondent prays that the intervening petition herein may be dismissed with costs.

KIRLIN CAMPBELL HICKOX KEATING
& MCGRANN,
Proctors for Claimant-Respondent,
Office and P. O. Address,
120 Broadway,
New York, N. Y.

(Verified by Edwin S. Murphy, as Attorney on April 27, 1943.)

80

Order Amending the Intervening Petition.

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Courtrooms thereof in the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 7th day of April, 1944.

Present—HONORABLE FRANCIS G. CAFFEY, *District Judge.*

81

[SAME TITLE.]

Upon the annexed consents and on motion of Bigham, Englar, Jones & Houston, proctors for intervening petitioners, it is

ORDERED that the intervening petition of Atlantic Mutual Insurance Company, et al., filed herein on or about April 6, 1943 be and the same is hereby amended to name and include Hanover Fire Insurance Company as intervening

Order Amending the Intervening Petition.

82 petitioner with the same force and effect as though originally named and included as intervening petitioner therein.

FRANCIS G. CAFFEY,
U. S. D. J.

We hereby consent to the entry of the foregoing order.

JAMES B. M. MCNALLY,
U. S. Attorney,
By VINCENT A. CATOGGIO, JR.,
Sp. Ass't,
83 Proctor for Libellant.

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
By E. A. MURPHY,
Proctors for Claimant
Belgium Overseas Transport, S. A.

Cross Libel of Belgian Overseas Transports.

84 *To the Honorable the Judges of the United States District Court for the Southern District of New York*

The cross-libel of Belgian Overseas Transports, S. A., as owner of M/S "Esso Belgium", on its own behalf and also on behalf of War Shipping Administration, against United States of America, owner of the SS "Nathaniel Bacon", in a cause of collision, civil and maritime, alleges on information and belief as follows:

First: At the times hereinafter mentioned cross-libelant, Belgian Overseas Transports S. A. was and now is a corporation duly organized and existing under the

laws of Belgium and was and is the sole owner of M/S 85
"Esso Belgium", hereinafter called the "Belgium", which is a twin screw motor tank vessel, 488.2 feet in length, 74.9 feet in breadth and 37.2 feet in depth, of 10,568 gross and 5,557 net registered tonnage and was, until the collision hereinafter set forth, tight, staunch, strong and in all respects seaworthy.

Second: At all the times hereinafter mentioned the United States of America was and is the sole owner of SS "Nathaniel Bacon", a merchant vessel, and that it operated, controlled and manned said vessel.

86

Third: SS "Nathaniel Bacon" is now within the jurisdiction of this Court.

Fourth: This cross-libel is filed pursuant to the provisions of the Suits in Admiralty Act, 1920. Cross-libelant elects that this suit may proceed in accordance with the principles of libels *in rem*.

Fifth: On the morning of November 24, 1942, the "Belgium" sailed from Pier 5, Bayonne, New Jersey in compliance with United States Naval orders. She was tight, staunch, strong and in all respects seaworthy. It 87
was raining but the visibility was good. The wind was southeast, force about 4, and the tide flood. The navigation was in charge of a duly licensed pilot, and with him on the bridge were the captain, the third officer and a qualified helmsman. On the forecastle head were the chief officer, the boatswain and a qualified lookout. The "Belgium" proceeded without incident down the Kill Van Kull and approached the Stapleton anchorage at slow speed. In the anchorage there were many vessels at anchor, stemming the flood tide and heading downstream. The area occupied by the anchored vessels

88 extended into the main ship channel. No navigational lights of any vessels underway were observed within said area. The "Belgium" proceeded slowly, making to pass between an anchored tanker which was lying in the main ship channel about 500 yards in a general northwesterly direction from Red Buoy No. 22, and a dredge which was working a short distance to the east of said anchored tanker. The engines of the "Belgium" were stopped as the "Belgium" approached the opening between the anchored tanker and the dredge. When the "Belgium" was near the stern of the anchored tanker, suddenly a red light and a white masthead light of a
89 vessel underway were seen off the starboard bow, to the right of the anchored tanker, only a short distance away, and at the same moment said vessel, which proved to be the "Nathaniel Bacon", sounded a one whistle signal. The "Nathaniel Bacon" was heading out of the crowded anchorage at considerable speed, and without due precaution, on a course directly across the bows of the anchored tanker and of the "Belgium". On sighting the navigational lights of the "Nathaniel Bacon" as aforesaid, both engines of the "Belgium" were immediately put full speed astern, a three blast signal was sounded
90 on the whistle, the starboard anchor was dropped, and the danger signal immediately sounded. The "Belgium", which had been proceeding slowly, quickly lost her headway, but the "Nathaniel Bacon" continued without reducing her speed across the bow of the anchored tanker and then across the bow of the "Belgium". The port side of the "Nathaniel Bacon", in the vicinity of the bridge, struck and seriously damaged the bow of the "Belgium" as she passed across. The "Nathaniel Bacon" continued with unabated speed and disappeared in the direction of Bay Ridge Flats. The collision occurred at about 7:20 A. M. The "Belgium" remained at anchor until about 7:55 A. M. when she moved out of the fair-

way to another anchorage, and thereafter returned to pier at Bayonne for examination. 91

Sixth: Said collision and the damages resulting therefrom were not caused or contribnted to by any fault on the part of the cross-libelant herein, or of the "Belgium", or those in charge of her, or of anyone for whose acts or omissions cross-libelant was responsible, but were wholly caused by fault and negligence on the part of the "Nathaniel Bacon", and those in charge of her, in the following respects, among others:

1. In that those in charge of her were careless and inattentive to their duties. 92

2. In that she failed to keep a proper lookout.

3. In that she proceeded out of the anchorage and across the main channel without regard to the presence of vessels underway in the main channel.

4. In that she navigated through and beyond the anchorage without regard to the special circumstances of the case.

5. In that she proceeded at an immoderate and excessive rate of speed. 93

6. In that she failed to take due precaution to avoid collision.

Seventh: By reason of the premises, cross-libelant has sustained damages which amount to about the sum of Ten Thousand ($10,000.00) Dollars, as nearly as can now be estimated, consisting of cost of repairs and other incidental expenses incurred by reason of the collision, no part of which has been paid although duly demanded.

Eighth: At all times hereinbefore mentioned the "Belgium" was under time charter to War Shipping Adminis-

94 tration. Pursuant to the terms of said charter, War Shipping Administration has paid or is obliged to pay charter hire to cross-libelant for the use of the "Belgium". As a result of the matters above set forth, War Shipping Administration has lost the use of said vessel during the period of detention necessitated by the repair of damages due to said collision, all to its damage in the amount of Twelve Thousand ($12,000.00) Dollars. Cross-libelant is authorized and required by War Shipping Administration to make claim for said detention damages on behalf of War Shipping Administration and to bring
95 suit therefor on its behalf.

Ninth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, cross-libelant prays that process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the United States of America and that it may be cited to appear and answer upon oath all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree to
96 cross-libelant payment of damages as aforesaid, with interest and costs, and that cross-libelant may have such other and further relief as may be just.

KIRLIN CAMPBELL HICKOX KEATING
& MCGRANN,
Proctors for Cross-libelant,
Office & P. O. Address,
120 Broadway,
Borough of Manhattan,
City of New York.

(Verified by Edwin S. Murphy, as Attorney, on April 23, 1942.)

Order Amending Cross Libel.

97

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A126-167

BELGIAN OVERSEAS TRANSPORTS S. A., as owner of M/S "Esso Belgium",

Cross Libellant,

—against—

UNITED STATES OF AMERICA, as owner of S. S. "Nathaniel Bacon", 98

Cross Respondent.

WHEREAS United States of America, respondent, through the United States Attorney for the Southern District of New York, Admiralty Division, has requested that the cross libel herein be amended to eliminate any claim on behalf of War Shipping Administration or the United States of America for loss of use by detention during repairs of M. S. "Esso Belgium", and

99

WHEREAS cross libellant herein wishes to amend its allegations of damages sustained by reasons of the matters stated in the cross libel in order to set forth a claim of approximately $20,000 so nearly as can now be ascertained:

Now on motion of Kirlin, Campbell, Hickox, Keating & McGrann, proctors for cross libellant, and on the subjoined consent, it is

Order Amending Cross Libel.

100 ORDERED that the caption of the cross libel herein be and it is amended to read as follows:

> "The cross libel of Belgium Overseas Transports S. A., as owners of the M. S. 'Esso Belgium' against the United States of America as owners of S. S. 'Nathaniel Bacon', in a cause of collision, civil and maritime, alleges on information and belief as follows:"

and it is further,

101 ORDERED that Article Seventh of said cross libel be and hereby is amended to read as follows:

> "Seventh: By reason of the premises, cross-libellant has sustained damages which amount to about the sum of $20,000, so nearly as can now be ascertained, consisting of cost of repairs, loss of use of M. S. 'Esso Belgium' by detention during repairs, and other incidental expenses incurred by reason of the collision, no part of which has been paid although duly demanded."

and it is further,

102 ORDERED that Article Eighth of said cross libel be and it hereby is struck out, and the number of Article Ninth of said libel be changed to "Eighth".

S. J. RIFKIND,
U. S. D. J.

Dated: June 25, 1943.

Order Further Amending Cross Libel.

[SAME TITLE.]

WHEREAS Atlantic Mutual Insurance Company, et al., insurers of cargo laden of the Steamship "Nathaniel Bacon", intervening for their own interests and those of their assureds, have filed an intervening petition in an action in this Court entitled "United States of America as owners of the Steamship 'Nathaniel Bacon' and as bailee of her cargo, libelant, against Motor Vessel 'Esso Belgium', her engines, boilers, tackle, etc. Belgium Overseas Transport S. A., claimant", Docket No. A 126-101, and

WHEREAS an order having been entered herein on June 25, 1943 amending Article Seventh of the cross-libel, and

WHEREAS, the United States of America has not yet filed an answer to the cross-libel herein,

Now on motion of Kirlin, Campbell, Hickox, Keating & McGrann, proctors for cross-libellant, and on the subjoined consent, it is

ORDERED that Article Seventh of the said cross libel be and hereby is further amended to read as follows:

"Seventh: By reason of the premises, cross libelant has sustained damages which amount to about the sum of $20,000, so nearly as can now be ascertained, consisting of cost of repairs, loss of use of M. S. 'Esso Belgium' by detention during repairs, and other incidental expenses incurred by reason of the collision, no part of which has been paid although duly demanded: and in addition thereto, cross-libelant, denying any and all liability

Order Further Amending Cross Libel.

106 —therefor, claims against the United States of America, the amount, if any, which cross libelant or M. S. 'Esso Belgium' may be held liable to pay to any person or corporation with respect to damages alleged to have been sustained in consequence of, or in connection with, said collision, by any cargo on board S. S. 'Nathaniel Bacon'."

W. BONDY,
U. S. D. J.

Dated: February 14, 1944.

107

Answer to Cross Libel.

[SAME TITLE.]

The answer of the respondent to the libel herein as amended by this Court's order respectfully alleges upon information and belief as follows:

108 First: It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph First, and demands strict proof thereof, that the vessel was tight, staunch, strong and in all respects seaworthy.

Second: It admits the allegations contained in Paragraph Second.

Third: It admits the allegations contained in Paragraph Third.

Fourth: It is not required to answer Paragraph Fourth.

Answer to Cross Libel.

Fifth: Except as hereinafter admitted, it denies the allegations contained in Paragraph Fifth. 109

Sixth: It denies the allegations contained in Paragraph Sixth.

Seventh: It denies the allegations contained in Paragraph Seventh.

Eighth: Paragraph Eighth of the libel has been stricken out.

Ninth: It admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court and, except as admitted, denies the remaining allegations contained in Paragraph Ninth. 110

FURTHER ANSWERING THE LIBEL HEREIN THE RESPONDENT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

Tenth: The circumstances of the aforesaid collision were as follows: The "Nathaniel Bacon", loaded with a general cargo, lay anchored to the eastward of Tompkinsville, Staten Island. At about 7:05 a. m. she heaved anchor and with proper navigation lights burning, got under way, bound for Pier 35, North River. With her engines running at various speeds she proceeded very slowly and steadied on a course headed for Owl's Head Buoy No. 24. Daylight had not yet broken and a light rain was falling. The "Esso Belgium" was observed on the "Nathaniel Bacon's" port bow showing her green light. The "Nathaniel Bacon" sounded a one-blast whistle signal and the "Esso Belgium" answered with one blast. The "Nathaniel Bacon" continued ahead and permitted a United States Army dredge, which was approaching, to cross from the "Nathaniel Bacon's" port to starboard bow 111

112 and the "Bacon" passed under the stern of the dredge. Meanwhile, the "Esso Belgium", without reducing her speed or checking her headway, approached close aboard the port side of the "Nathaniel Bacon". The "Esso Belgium" was heard to sound a three-whistle backing signal and the alarm and to let go her starboard anchor, but she continued on with headway unabated and her bow came into violent collision with the port side of the "Nathaniel Bacon" in the way of No. 3 cargo hold and forward of the bridge.

113 Eleventh: The aforesaid collision and damage were not caused or contributed to by any fault or neglect on the part of the respondent or of the officers and crew of the SS "Nathaniel Bacon" but were caused solely by the fault and neglect of the MS "Esso Belgium" and those aboard and in charge of her in the following among other particulars which will be pointed out at the trial of this action:

1. In that those in charge of the MS "Esso Belgium" were careless, incompetent and inattentive to their duties.

114 2. In that the MS "Esso Belgium" was improperly manned and equipped.

3. In failing to have a lookout properly stationed and attending to his duties.

4. In failing to navigate to pass the "Nathaniel Bacon" as the situation required.

5. In failing to direct her course to her own starboard.

6. In failing to pass under the stern of the "Nathaniel Bacon".

7. In failing to stop and reverse in time to avoid collision.

8. In failing to make due allowance for wind and tide and to take into consideration the existing circumstances. 115

9. In failing to navigate in compliance with the one-whistle signal exchanged with the "Nathaniel Bacon".

10. In failing to keep out of the way of a privileged vessel.

11. In proceeding at an immoderate, improper and excessive speed.

12. In failing to sound proper whistle signals. 116

13. In failing to take any or any proper steps to avoid collision.

WHEREFORE, respondent prays that the cross-libel herein be dismissed with costs and disbursements.

JAMES B. M. MCNALLY,
United States Attorney,
Office and P. O. Address,
Room 618, 45 Broadway,
New York 6, New York. 117

(Verified by Vincent A. Catoggio, Jr., as Special Assistant, on March 4, 1944.)

Petition of United States of America to Implead Farr Sugar Corporation, et al.

118

To the Honorable the Judges of the United States District Court for the Southern District of New York

The petition of the United States of America, as owner of the SS "Nathaniel Bacon", to implead

Farr Sugar Corporation
Schieffelin & Company
Park & Tilford Import Corporation
Standard Food Products Corporation
119 P. Lorillard Company, Inc.
Lanborn & Company, Inc.
American Spirits Inc.
McKesson & Robbins Inc.
Canada Dry Ginger Ale, Inc.
R. C. A. Mfg. Company
"21" Brands Inc.
N. Duys & Company, Inc.
Hamburger Bros. & Company, Inc.
Porcella Vincini & Company, Inc.
General Cigar Company, Inc.
Durlach Bros., Inc.
120 S. Ruppin Inc.
Julius Wile Sons & Company, Inc.
L. W. Minford & Company, Inc.
V. Cassazza & Bro., Inc.
Equitable Trading Corporation
Picardy Mills Inc.
Cambridge Handkerchief Works, Inc.
Lande & Miskind Inc.
David E. Schwab & Company, Inc.
Bernhard Ulmann Company, Inc.
Joseph Love Inc.
J. Sklar Mfg. Company, Inc.
Red Star Button Company, Inc.

121

Tiny Town Togs Inc.
A. N. Saab Co., Inc.
Block Frères Inc.
Aris Gloves Inc.
J. H. Kimball, Inc.
David F. Schwab & Company, Inc.
J. Zurcher Company, Inc.
Nurse-Wear Hosiery Company, Inc.
Peter J. Michels Inc.
Guzofsky-Kalinsky Inc.
Hyman & Hyman Beauty Prod. Inc.

122

Arnold M. Ebbe Company, Inc.
Solex Laboratories Inc.
International General Elec. Company
The Hills Bros. Company
Porto Rican Express Company
Manhattan Shirt Company
J. Jolles Studios
I. Shalom & Company
Saxe Bendit Company
Handcraft Undergarment Company
General Handkerchief Company
Malina Company

123

F. Schumacher & Company
Miami Valley Tobacco Company
Plazuela Sugar Company
N. Y. & P. R. R. S. S. Company
Westinghouse Electric Int'l. Company
Mathieson Alkali Works Inc.
Nash-Kelvinator Company
The Frank Tea & Spice Company
I. Lewis Cigar Mfg. Company
Consolidated Cigar Corporation
The Virgin Islands Company
J. Stromeyer Company

124

Paris Beauty Supply Company
The Glemby Company, Inc.
Tin Salvage Institute
Delite Products Company
American Lady Specialties Mfg. Company
Gibbs & Company
M. B. Cohen Company
Lanza Silk Dyeing Company, Inc.
D'Angelo Silk Throwing Company
Brower Bros. Silk Company, Inc.
Leonard Custom Tailors Company

125

Lederle Laboratories Inc.
Tanners Shoe Company
Samuel & Benj. L. Grabosky (first name fictitious)
Bernard O. Clark (first name fictitious)
Kenneth Krack (first name fictitious)
Otto Muller
Ralph Williams
Gerald Udell
Mrs. Tom Ritchie
Walter E. Lord
Henry L. Gilgoff (first name fictitious)

126

Wilbur H. Holly
Robert A. Irizarry (first name fictitious)
Jose Ortiz
Margarite Jensen
Arthur E. Mann (first name fictitious)
Frank A. Delaney
Jacob Tanenbaum
Harry A. Nadler (first name fictitious)
Manuela Diaz
Joseph A. Rivera (first name fictitious)
Mrs. Daisy Terrano
Abraham Radinsky, doing business under the name Pacific Undergarment Company

127

David and Larry Kliven, doing business under the name Peerless Undergarment Company

P. E. Anderson—G. J. Briasco, doing business under the name John H. Rodriguez Company

John Bass, John B. Warnock, Theodore Mutter, doing business under the name L. W. & P. Armstrong Inc.

George, Michael, Joseph Mabarak, doing business under the name Mabarak Bros.

Julius Baer, Carl Badman, doing business under the name B. Dickson & Co.

Jules A. Des Angles, doing business under the name Jules A. Des Angles Co. Inc. 128

David A. and Selim A. Sutton, doing business under the name A. D. Sutton & Sons

Jacob Maleh, Sam and Jack Hamway, doing business under the name Maleh & Hamway

Rudolph and Harry Attillo, Sydney de Mea, doing business under the name De Mea Bros.

Ben Guzofsky, doing business under the name Ben Gee Sales Co.

George, Elias and Ameen Bardwil, doing business under the name George E. Bardwil & Sons

Nathan Lachoff, doing business under the name Estelle Dress & Sportswear Co. 129

Juan Mas, doing business under the name J. Mas & Co.

Samuel Rochelson, David Rudolf, doing business under the name Osage Handkerchief Co.,

pursuant to the 56th Rule in Admiralty, to the libel and complaint of Belgian Overseas Transports, S. A., as owner of the MS "Esso Belgium", against the United States of America, as owner of the SS "Nathaniel Bacon", in an

130 alleged cause of collision, civil and maritime, respectfully shows on information and belief as follows:

First: That the petitioner, United States of America, is now, and at all the times hereinafter mentioned was, a corporation sovereign and the owner of the SS "Nathaniel Bacon".

Second: At all the times hereinafter mentioned the respondents-impleaded, whose names are set forth in this article were, and now are, corporations duly organized
131 and existing under the laws of the states set forth below:

Lamborn & Co., Inc., Standard Food Products Corp., Park & Tilford Import Corp., "21" Brands Inc., Schieffelin & Co., P. Lorillard Co., Inc., H. Duys & Co., Inc., Hamburger Bros. & Co., Inc., International General Electric Co., Porcella Vincini & Co., Inc., General Cigar Co., Inc., Durlach Bros., Inc., S. Ruppin Inc., Julius Wile Sons & Co., Inc., The Hills Bros., Co., Farr Sugar Corp., L. W. Minford & Co., Inc., V. Cassazza & Bro., Inc., Equitable Trading Corp., Picardy Mills Inc., Cambridge Hand-
132 kerchief Works, Inc., Porto Rican Express Co., Lande & Miskind Inc., David E. Schwab & Co., Inc., Manhattan Shirt Co., Bernhard Ulmann Co., Inc., Joseph Love, Inc., J. Sklar Mfg. Co., Inc., Red Star Button Co., Inc., J. Jolles Studios, Tiny Town Togs, Inc., A. N. Saab Co., Inc., I. Shalom & Co., Block Freres Inc., Saxe Bendit Co., Aris Gloves Inc., Handcraft Undergarment Co., J. H. Kimball Inc., David E. Schwab & Co., Inc., General Handkerchief Co., J. Zurcher Co., Inc., Nurse-Wear Hosiery Co., Inc., Peter J. Michels Inc., Guzofsky-Kalinsky Inc., Hyman & Hyman Beauty Prod. Inc.,

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Malina Co., F. Schumacher & Co., Arnold M. Ebbe Co., Inc., Solex Laboratories, Inc., all under the laws of the State of New York;

Westinghouse Electric Int'l Co., Canada Dry Ginger Ale, Inc., Consolidated Cigar Corp., The Glemby Co., Inc., Lederle Laboratories, Inc., all under the laws of the State of Delaware;

Mathieson Alkali Works Inc., under the laws of the State of Virginia;

American Spirits Inc., McKesson & Robbins Inc., both under the laws of the State of Maryland;

Nash-Kelvinator Co., under the laws of the State 134 of Michigan;

Miami Valley Tobacco Co., Plazuela Sugar Co., N. Y. & P. R. R. S. S. Co., The Frank Tea & Spice Co., I. Lewis Cigar Mfg. Co., The Virgin Island Co., J. Stromeyer Co., M. B. Cohen Co., Paris Beauty Supply Co., Tin Salvage Institute, R. C. A. Mfg. Co., Delite Products Co., American Lady Specialties Mfg. Co., Gibbs & Co., Lanza Silk Dyeing Co., D'Angelo Silk Throwing Co., Brower Bros. Silk Co., Inc., Leonard Custom Tailors Co., Tanners Shoe Co., all are foreign corporations.

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Third: Heretofore, and on or about December 24, 1942, a libel was filed in this court by the Belgian Overseas Transports, S. A., as owner of MS "Esso Belgium", against the United States of America, as owner of the SS "Nathaniel Bacon", which under date of February 14, 1944 was amended and in which it is alleged that the MS "Esso Belgium" and her owners were caused to sustain damage in the sum of $20,000. as the result of a collision on November 24, 1942 in New York Harbor between the MS "Esso Belgium" and the SS "Nathaniel Bacon"; and the said libel as amended further alleges

136 that the cross-libelant claims against United States of America the amount, if any, which cross-libelant of MS "Esso Belgium" may be held liable to pay to any person or corporation with respect to damages alleged to have been sustained in consequence of or in connection with said collision by any cargo on board SS "Nathaniel Bacon".

Fourth: The true facts and circumstances of the said collision, upon information and belief, are as follows:

137 The "Nathaniel Bacon", loaded with a general cargo, lay anchored to the eastward of Tompkinsville, Staten Island. At about 7:05 a. m. she heaved anchor and with proper navigation lights burning, got under way, bound for Pier 35, North River. With her engines running at various speeds she proceeded very slowly and steadied on a course headed for Owl's Head Buoy No. 24. Daylight had not yet broken and a light rain was falling. The "Esso Belgium" was observed on the "Nathaniel Bacon's" port bow showing her green light. The "Nathaniel Bacon" sounded a one-blast whistle signal and the "Esso Belgium" answered with one

138 blast. The "Nathaniel Bacon" continued ahead and permited a United States Army dredge, which was approaching, to cross from the "Nathaniel Bacon's" port to starboard bow and the "Bacon" passed under the stern of the dredge. Meanwhile, the "Esso Belgium", without reducing her speed or checking her headway, approached close aboard the port side of the "Nathaniel Bacon". The "Esso Belgium" was heard to sound a three-whistle backing signal and the alarm and to let go her starboard anchor, but she continued on with headway unabated and her bow came into violent collision with the port side of the "Nathaniel Bacon" in

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the way of No. 3 cargo hold and forward of the bridge.

Fifth: The aforesaid collision and damage were not caused or contributed to by any fault or neglect on the part of the respondent or of the officers and crew of the SS "Nathaniel Bacon" but were caused solely by the fault and neglect of the MS "Esso Belgium" and those aboard and in charge of her in the following among other particulars which will be pointed out at the trial of this action:

1. In that those in charge of the MS "Esso Belgium" were careless, incompetent and inattentive to their duties. 140
2. In that the MS "Esso Belgium" was improperly manned and equipped.
3. In failing to have a lookout properly stationed and attending to his duties.
4. In failing to navigate to pass the "Nathaniel Bacon" as the situation required.
5. In failing to direct her course to her own starboard.

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6. In failing to pass under the stern of the "Nathaniel Bacon".
7. In failing to stop and reverse in time to avoid collision.
8. In failing to make due allowance for wind and tide and to take into consideration the existing circumstances.
9. In failing to navigate in compliance with the one-whistle signal exchange with the "Nathaniel Bacon".

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10. In failing to keep out of the way of a privileged vessel.

11. In proceeding at an immoderate, improper and excessive speed.

12. In failing to sound proper whistle signals.

13. In failing to take any, or any proper, steps to avoid collision.

Sixth: Pursuant to order of this court, dated April 6,
143 1943, the Atlantic Mutual Insurance Company and fifteen other insurance companies filed a petition of intervention in this Court in an action theretofore instituted by the United States of America, as owner of the SS "Nathaniel Bacon", against the MS "Esso Belgium", in which the said petitioning intervenors alleged that they were the insurers and their assureds were the owners and/or shippers and/or consignees of cargo laden on the SS "Nathaniel Bacon", and in which petitioning intervenors state that they or their assureds have been damaged in the sum of $200,000., and in which they demand from the MS "Esso Belgium" their damages for their own interest and as
144 agents or trustees for their respective assureds and make claim on behalf of, and for the interest of, all parties who may be, or may become, interested in the shipments on board the SS "Nathaniel Bacon".

Seventh: Petitioner further alleges that the cargo mentioned in the libel herein as amended was shipped on the SS "Nathaniel Bacon" from San Juan, Puerto Rico, to be transported to New York according to certain bills of lading duly signed and delivered to the shipper in consideration of payment of certain freight.

Said bills of lading, a photostatic copy of which is annexed hereto and made a part hereof, constituted the contract of carriage under which said cargo was transported and contained among others the following provisions: 145

"9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will 146 indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any 147 ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

Eighth: In the event the Court concludes that said collision and damages resulting therefrom to the cross-libelant and/or the intervening sixteen insurance companies referred to in Paragraph Sixth hereof were caused by negligent navigation of both the "Esso Belgium" and the "Nathaniel Bacon", then and in that event the intervening sixteen insurance companies for their own account and the account of the respondents-impleaded herein will

148 recover their damages in full from the "Esso Belgium", whereupon the amount so adjudged to be paid by the "Esso Belgium" would become part of the damages sustained by the cross-libelant herein, Belgian Overseas Transports, S. A., as owner and claimant of the MS "Esso Belgium", as a result of the collision, and one-half thereof would be recovered by the latter by way of set off, recoupment or otherwise from the United States of America, as owner of the "Nathaniel Bacon". In that event, under the terms of Clause IX of the contract of
149 carriage under which said cargo was transported, the provisions of which are set forth in Paragraph Seventh hereof, petitioner is entitled to be indemnified by the respondents-impleaded, as owners of said cargo, to the amount which the "Esso Belgium" and Belgian Overseas Transports, S. A., her owner and cross-libelant herein, recovers from respondent by way of set off, recoupment or otherwise on account of damage to cargo laden on board the "Nathaniel Bacon" at the time of the above-mentioned collision.

Ninth: By reason of the premises, Farr Sugar Cor-
150 poration and all the other respondents-impleaded mentioned herein are liable herein for whatever amount, if any, the "Esso Belgium" and/or her owners, the cross-libelant, recover herein from the respondent and/or the "Nathaniel Bacon" by way of set off, recoupment or otherwise on account of damage sustained by cargo laden on the "Nathaniel Bacon" at the time of the above-mentioned collision, and they are therefore necessary and proper parties defendant in this suit and ought to be proceeded against herein.

Tenth: Petitioner files herewith its answer to the cross-libel herein.

Petition of United States of America to Implead Farr Sugar Corporation, et al.

Eleventh: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, petitioner prays that process may issue, citing the Farr Sugar Corporation and each and every other respondent-impleaded whose name appears in the caption of this petition, to appear and answer this petition, to the effect that said respondent-impleaded may be proceeded against in this suit for the amount which the "Esso Belgium" or Belgian Overseas Transports, S. A., may recover from the United States of America by way of set off, recoupment or otherwise on account of any payment made to the intervening sixteen insurance companies referred to in Paragraph Sixth herein for damage to cargo resulting from the above mentioned collision, and that the Court will dismiss the libel herein as against the United States of America, and that the petitioner may have such other and further relief as the justice of the cause may require.

JAMES B. M. MCNALLY,
United States Attorney,
Office and P. O. Address,
Room 618, 45 Broadway,
New York 6, New York.

(Verified by Vincent A. Catoggio, Jr., as Special Assistant, on March 4, 1944.)

BILL OF LADING, ANNEXED TO PETITION OF UNITED STATES OF AMERICA TO IMPLEAD FARR SUGAR CORPORATION, ET AL.

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1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (except as may be otherwise specifically provided herein) shall govern before
155 the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any delay, non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier. If this bill of lading is issued in a locality where there is in force a Carriage of Goods by Sea Act or Ordinance or Statute of a similar nature to the International Convention for the Unification of Certain Rules Relating to Bills of Lading at Brussels of August 25, 1924,
156 it is subject to the provisions stated in such Act, Ordinance and rules thereto annexed which may be in effect where this bill of lading is issued.

(a) The Carrier shall be entitled to the full benefit of, and right to, all limitations of, or exemptions from, liability authorized by any provisions of Sections 4281 to 4286 of the Revised Statutes of the United States and amendments thereto and of any other provisions of the laws of the United States or of any other country whose laws shall apply. If the ship is not owned by or chartered by demise to the War Shipping Administration or the Company designated herein (as may be the case notwithstanding anything that appears to the contrary) this

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bill of lading shall take effect only as a contract with the owner or demise charterer, as the case may be, as principal, made through the agency of the War Shipping Administration or the Company designated herein which acts as agent only and shall be under no personal liability whatsoever in respect thereof. If, however, it shall be adjudged that any other than the owner or demise charterer is carrier and/or bailee of the goods all limitations of and exonerations from liability provided by law or by the terms hereof shall be available to such other.

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2. In this bill of lading the word "ship" shall include any substituted vessel, and any craft, lighter or other means of conveyance owned, chartered or operated by the Carrier used in the performance of this contract; the word "Carrier" shall include the ship, her owner, master, operator, demise charterer, and if bound hereby the time charterer, and any substituted carrier, whether the owner, operator, charterer, or master shall be acting as carrier or bailee; the word "shipper" shall include the person named as such in this bill of lading and the person for whose account the goods are shipped; the word "consignee" shall include the holder of the bill of lading, properly endorsed, and the receiver and the owner of the goods; the word "charges" shall include freight and all expenses and money obligations incurred and payable by the goods, shipper, consignee, or any of them.

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3. The scope of voyage herein contracted for shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised, geographical, usual or ordinary route or order, even though in proceeding thereto the ship may sail beyond the port of discharge or in a direction contrary thereto or return to the original port, or depart

160 from the direct or customary route, and includes all canals, straits and other waters. The ship may call at any port for the purposes of the current voyage or of a prior or subsequent voyage. The ship may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; may for matters occurring before loading the goods, known or unknown at the time of such loading and matters occurring after such loading, either with or without the goods or passengers on board, and before or after proceeding toward the port of dis-
161 charge, adjust compasses, dry dock, with or without cargo aboard go on ways or to repair yards, shift berths, make trial trips or tests, take fuel or stores, remain in port, sail with or without pilots, tow and be towed, and save or attempt to save life or property; and all of the foregoing are included in the contract voyage.

4. In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the Carrier or the Master is likely to give rise to risk of capture, seizure, detention, damage, delay or dis-
162 advantage to or loss of the ship or any part of her cargo, to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual or agreed place of discharge in such port, the Carrier may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the goods at port of shipment and upon failure to do so, may warehouse the goods at the risk and expense of the goods; or the Carrier or the Master, whether or not proceeding toward or entering or attempting to enter

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the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may discharge the goods into depot, lazaretto, craft, or other place; or the ship may proceed or return, directly or indirectly, to or stop at any port or place whatsoever as the Master or the Carrier may consider safe or advisable under the circumstances, and discharge the goods, or any part thereof, at any such port or place; or the Carrier or the Master may retain the cargo on board until the return trip or until such time as the Carrier or the Master thinks advisable and discharge the goods at any place whatsoever as herein provided; or the Carrier or the Master may discharge and forward the goods by any means, rail, water, land, or air at the risk and expense of the goods. The Carrier or the Master is not required to give notice of discharge of the goods or the forwarding thereof as herein provided. When the goods are discharged from the ship, as herein provided, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Carrier shall be freed from any further responsibility. For any services rendered to the goods as hereinabove provided, the Carrier shall be entitled to a reasonable extra compensation.

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5. The Carrier, Master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the

166 war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage. The ship may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy.

In addition to all other liberties herein the Carrier shall have the right to withhold delivery of, reship to, deposit or discharge the goods at any place whatsoever, surrender
167 or dispose of the goods in accordance with any direction, condition or agreement imposed upon or exacted from the Carrier by any government or department thereof or any person purporting to act with the authority of either of them. In any of the above circumstances the goods shall be solely at their risk and expense and all expenses and charges so incurred shall be payable by the shipper or consignee thereof and shall be a lien on the goods.

6. Unless otherwise stated herein, the description of the goods and the particulars of the packages mentioned herein are those furnished in writing by the shipper and
168 the Carrier shall not be concluded as to the correctness of marks, number, quantity, weight, gauge, measurement, contents, nature, quality or value. Single pieces or packages exceeding 4480 lbs. in weight shall be liable to pay extra charges in accordance with tariff rates in effect at time of shipment for loading, handling, transshipping or discharging and the weight of each such piece or package shall be declared in writing by the shipper on shipment and clearly and durably marked on the outside of the piece or package. The shipper and the goods shall also be liable for, and shall indemnify the Carrier in respect of any injury, loss or damage arising from shipper's failure to declare and mark the weight of any such piece

or package or from inadequate or improper description of the goods or from the incorrect weight of any such piece or package having been declared or marked thereon, or from failure fully to disclose the nature and character of the goods.

7. Goods may be stowed in poop, forecastle, deck house, shelter deck, passenger space or any other covered in space commonly used in the trade and suitable for the carriage of goods, and when so stowed shall be deemed for all purposes to be stowed under deck. In respect of goods carried on deck all risks of loss or damage by perils inherent in such carriage shall be borne by the shipper or the consignee but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act notwithstanding Sec. 1 (c) thereof, or the corresponding provision of any Carriage of Goods by Sea Act that may be applicable. Specially heated or specially cooled stowage is not to be furnished unless contracted for at an increased freight rate. Goods or articles carried in any such compartment are at the sole risk of the owner thereof and subject to all the conditions, exceptions and limitations as to the Carrier's liability and other provisions of this bill of lading; and further the Carrier shall not be liable for any loss or damage occasioned by the temperature, risks of refrigeration, defects or insufficiency in or accidents to or explosion, breakage, derangement or failure of any refrigerator plant or part thereof, or by or in any material or the supply or use thereof used in the process of refrigeration unless shown to have been caused by negligence of the Carrier from liability for which the Carrier is not by law entitled to exemption.

Bill of Lading, Annexed to Petition of United States of America to Implead Farr Sugar Corporation, et al.

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8. Live animals, birds, reptiles and fish are received and carried at shipper's risk of accident or mortality, and the Carrier shall not be liable for any loss or damage thereto arising or resulting from any matters mentioned in Section 4, Sub-section 2, a to p inclusive of said Carriage of Goods by Sea Act or similar sections of any Carriage of Goods by Sea Act that may be applicable, or from any other cause whatsoever not due to the fault of the Carrier, any warranty of seaworthiness in the premises being hereby waived by the shipper. Except as provided above such shipments shall be deemed goods, and shall be
173 subject to all terms and provisions in this bill of lading relating to goods.

9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or
174 damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

10. General average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, in-

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clusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the Carrier, and as to matters not provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required 176
by the Carrier, must be furnished before delivery of the goods. Such cash deposit as the Carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods; shippers, consignees or owners of the goods to the Carrier before delivery. Such deposit shall, at the option of the Carrier, be payable in United States money and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the General Average and refunds or credit balances, if any, shall 177
be paid in United States money.

In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract, or otherwise, the goods, the shipper and the consignee, jointly and severally, shall contribute with the Carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges

178 incurred in respect of the goods. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully and in the same manner as if such salving ship or ships belonged to strangers.

11. Whenever the Carrier or the Master may deem it advisable or in any case where the goods are consigned to a point where the ship does not expect to discharge, the Carrier or Master may, without notice, forward the whole or any part of the goods before or after loading at the original port of shipment, or any other place or
179 places even though outside the scope of the voyage or the route to or beyond the port of discharge or the destination of the goods, by any vessel, vessels or other means of transportation by water or by land or by air or by any such means, whether operated by the Carrier or by others and whether departing or arriving or scheduled to depart or arrive before or after the ship expected to be used for the transportation of the goods. This Carrier, in making arrangements for any transshipping or forwarding vessel or means of transportation not operated by this Carrier shall be considered solely the forwarding agent of the
180 shipper and without any other responsibility whatsoever.

The carriage by any transshipping or forwarding carrier and all transshipment or forwarding shall be subject to all the terms whatsoever in the regular form of bill of lading, freight note, contract or other shipping document used at the time by such carrier, whether issued for the goods or not, and even though such terms may be less favorable to the shipper or consignee than the terms of this bill of lading and may contain more stringent requirements as to notice of claim or commencement of suit and may exempt the on-carrier from liability for negligence. The shipper expressly authorizes the Carrier to arrange with any such transshipping or forwarding

carrier that the lowest valuation of the goods or limitation of liability contained in the bill of lading or shipping document of such carrier shall apply even though lower than the valuation or limitation herein, provided that the shipper shall not be compelled to pay a rate higher than that applicable to the valuation contained in such bill of lading. Pending or during transshipment the goods may be stored ashore or afloat at their risk and expense and the Carrier shall not be liable for detention. 181

12. The port authorities are hereby authorized to grant a general order for discharging immediately upon arrival of the ship and the Carrier without giving notice either of arrival or discharge, may discharge the goods directly they come to hand, at or onto any wharf, craft or place that the Carrier may select, and continuously Sundays and holidays included, at all such hours by day or by night as the Carrier may determine no matter what the state of the weather or custom of the port may be. The Carrier shall not be liable in any respect whatsoever if heat or refrigeration or special cooling facilities shall not be furnished during loading or discharge or any part of the time that the goods are upon the wharf, craft, or other loading or discharging place. All lighterage and use of craft in discharging shall be at the risk and expense of the goods. Landing and delivery charges and pier dues shall be at the expense of the goods unless included in the freight herein provided for. If the goods are not taken away by the consignee by the expiration of the next working day after the goods are at his disposal, the goods may at Carrier's option and subject to Carrier's lien, be sent to store or warehouse or be permitted to lie where landed, but always at the expense and risk of the goods. The responsibility of the Carrier in any capacity shall altogether cease and the goods shall be considered to be 182 183

184 delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities. The Carrier shall not be required to give any notification of disposition of the goods.

13. The Carrier shall not be liable for failure to deliver in accordance with marks unless such marks shall have been clearly and durably stamped or marked by the shipper before shipment upon the goods or packages, in letters and numbers not less than two inches high, together with name of the port of discharge. Goods that
185 cannot be identified as to marks or numbers, cargo sweepings, liquid residue and any unclaimed goods not otherwise accounted for shall be allocated for completing delivery to the various consignees of goods of like character, in proportion to any apparent shortage, loss of weight or damage. Loss or damage to goods in bulk stowed without separation from other goods in bulk of like quality, shipped by either the same or another shipper, shall be divided in proportion among the several shipments.

14. The goods shall be liable for all expense of mend-
186 ing, cooperage, baling or reconditioning of the goods or packages and gathering of loose contents of packages; also for any payment, expense, fine, dues, duty, tax, impost, loss, damage or detention sustained or incurred by or levied upon the Carrier or the ship in connection with the goods, howsoever caused, including any action or requirement of any government or governmental authority or person purporting to act under the authority thereof, seizure under legal process or attempted seizure, incorrect or insufficient marking, numbering or addressing of packages or description of the contents, failure of the shipper to procure consular, Board of Health or other certificates to accompany the goods or to comply with laws or regu-

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lations of any kind imposed with respect to the goods by the authorities at any port or place or any act or omission of the shipper or consignee.

15. Freight shall be payable on actual gross intake weight or measurement or, at Carrier's option, on actual gross discharged weight or measurement. Freight may be calculated on the basis of the particulars of the goods furnished by the shipper herein but the Carrier may at any time open the packages and examine, weigh, measure and value the goods. In case shipper's particulars are found to be erroneous and additional freight is payable, 188
the goods shall be liable for any expense incurred for examining, weighing, measuring and valuing the goods. Full freight shall be paid on damaged or unsound goods. Full freight hereunder to port of discharge named herein shall be considered completely earned on shipment whether the freight be stated or intended to be prepaid or to be collected at destination; and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost or the voyage broken up or abandoned. 189
If there shall be a forced interruption or abandonment of the voyage at the port of shipment or elsewhere any forwarding of the goods or any part thereof shall be at the risk and expense of the goods. All unpaid charges shall be paid in full and without any offset, counterclaim or deduction in the currency of the port of shipment, or, at Carrier's option, in the currency of the port of discharge at the demand rate of New York exchange as quoted on the day of the ship's entry at the Custom House of her port of discharge. The Carrier shall have a lien on the goods, which shall survive delivery, for all charges due hereunder and may enforce this lien by public or private

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sale and without notice. The shipper and the consignee shall be jointly and severally liable to the Carrier for the payment of all charges and for the performance of the obligation of each of them hereunder.

16. Neither the Carrier nor any corporation owned by, subsidiary to or associated or affiliated with the Carrier shall be liable to answer for or make good any loss or damage to the goods occurring at any time and even though before loading on or after discharge from the ship, by reason or by means of any fire whatsoever, unless
191 such fire shall be caused by its design or neglect.

17. In case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, or pro rata in case of partial loss or dam-
192 age, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and the Carrier's liability, if any, shall not exceed the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value.

Whenever the value of the goods is less than $500 per package or other freight unit, their value in the calcula-

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tion and adjustment of claims for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less.

18. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the Carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence 194
of the delivery by the Carrier of the goods as described in the bill of lading. If the loss or damage is not apparent the notice must be given within three days of the delivery. The Carrier shall not be liable upon any claim for loss or damage unless written particulars of such claim shall be received by the Carrier within thirty days after receipt of the notice herein provided for.

19. In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery 195
of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear.

20. To avoid or alleviate preventions or delays in prosecution or completion of the voyage incident to the existence of hostilities, the Carrier has liberty and is authorized by the shipper and the owner of the goods to agree with the representatives of any government to submit the goods to examination at any place or places

196 whatsoever and to delay delivery of the same until any restriction asserted by any governmental authority shall have been removed. The Carrier may put the goods in store ashore or afloat at the risk and expense of the owner of the same pending examination; and thereupon the Carrier's responsibility shall end. Any damage or deterioration occasioned by such examination or by delay and other risks of whatsoever nature shall be solely for account of the owner of the goods. All expenses incurred by the Carrier in relation to such detention of the goods shall be
197 paid by the shipper or consignee or owner of the goods.

21. This Bill of Lading shall be construed and the rights of the parties thereunder determined according to the law of the United States.

22. Cargo skids and labor on quay are to be provided by ship's agent for account of consignee at current rates, and any cargo which may be ordered for delivery into fiscal deposits, must be taken by an official cartman appointed by the agent of the ship, at current rates for account and risk of consignee.

198 23. If any bagged or baled goods are landed slack or torn, receiver and/or consignee shall accept its proportion of the sweepings. Ship not responsible for loss of weight in bags or bales torn, mended or with sample holes.

24. Cotton: Description of the condition of the cotton does not relate to the insufficiency of or torn condition of the covering, nor to any damage resulting therefrom and Carrier shall not be responsible for damage of such nature.

25. Specie: Specie will not be shipped or landed by the Carrier; it must be put on board by the shipper, and

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will only be delivered on board on presentation of the bills of lading properly endorsed; it may be carried on at consignee's risk if delivery is not taken during the ship's stay in port, and in every case the liability of the Carrier shall cease when the specie leaves the ship's deck.

26. SPECIFIED DOCK DISCHARGE: If the carrier makes a special agreement, whether by stamp hereon or otherwise, to deliver the goods hereby receipted for at a specified dock or wharf at the port of discharge, it is mutually agreed that such agreement shall be construed to mean that the Carrier is to make such delivery only if, in the 200
sole judgment of the Master, the ship can safely under her own power, proceed to, lie at, and return from said dock or wharf, always afloat at any time of tide, and only if such dock or wharf is available to the ship immediately the ship is ready to discharge the goods and, that otherwise, the ship shall discharge the goods in accordance with Clause 12 of this bill of lading, whereupon Carrier's responsibility shall cease.

28. All agreements or freight engagements for the shipment of the goods are superseded by this bill of lading, 201
and all its terms, whether written, typed, stamped, or printed, are accepted and agreed by the shipper to be binding as fully as if signed by the shipper, any local customs or privileges to the contrary notwithstanding. Nothing in this bill of lading shall operate to limit or deprive the Carrier of any statutory protection or exemption from or limitation of liability. If required by the Carrier, one signed bill of lading duly endorsed must be surrendered to the agent of the ship at the port of discharge in exchange for delivery order.

Answer of Farr Sugar Corporation and American Spirits, Inc., Respondents Impleaded, to Petition of United States of America.

202

[SAME TITLE.]

To the Honorable the Judges of the United States District Court for the Southern District of New York.

The answer of Farr Sugar Corporation and American Spirits, Inc., respondents impleaded, to the petition of the United States of America, as owner of the S. S. "Nathaniel Bacon", respectfully alleges, upon information and belief, as follows:

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First: Admit the allegations set forth in article First.

Second: Admit the allegations set forth in article Second.

Third: Admit the allegations set forth in article Third.

Fourth: Admit that the collision between the S. S. "Nathaniel Bacon" and the "Esso Belgium" occurred substantially as alleged in article Fourth.

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Fifth: Admit that the M/S "Esso Belgium" was at fault in one or more of the respects alleged in article Fifth.

Deny that they have any knowledge or information sufficient to form a belief as to the remaining allegations of article Fifth.

Sixth: Admit the allegations set forth in article Sixth.

Seventh: Admit that the cargo laden on the S. S. "Nathaniel Bacon" was carried under bills of lading in

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form similar to that attached to the petition which contained, among other provisions, the clause set forth in article Seventh and respondents beg leave to refer to the original bills of lading for the complete provisions of the same.

Eighth: Answering article Eighth of said petition respondents impleaded deny that in the event the Court concludes that the collision referred to in the petition and the resulting damages were caused by or resulted from negligent navigation of both the "Esso Belgium" and the 206
"Nathaniel Bacon", petitioner, under the terms of Clause 9 of the contracts of carriage under which the cargo on the "Nathaniel Bacon" was transported, the provisions of which are set forth in article Seventh of the petition, is entitled to be indemnified by the respondents impleaded as owners of said cargo to the amount which the "Esso Belgium" and Belgian Overseas Transport, S. A., her owner and cross-libellant herein, recovers from respondents by way of setoff, recoupment or otherwise, on account of damage to cargo laden on board the "Nathaniel Bacon" at the time of the aforesaid collision.

Further answering, respondents impleaded admit 207
the remaining allegations set forth in article Eighth of the petition.

Ninth: Deny each and every allegation set forth in article Ninth.

Tenth: Admit the allegations set forth in article Tenth.

Eleventh: Admit the admiralty and maritime jurisdiction of the United States and of this Honorable Court and

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deny each and every other allegation set forth in article Eleventh.

FURTHER ANSWERING SAID IMPLEADING PETITION RESPONDENTS-IMPLEADED ALLEGE:

Twelfth: That the provisions of the clause of the bill of lading quoted in paragraph Seventh of the impleading petition are invalid, illegal, contrary to the statutes of
209 the United States and contrary to public policy and are therefore void.

Thirteenth: All and singular the premises are true.

WHEREFORE, respondents-impleaded pray that the impleading petition herein be dismissed with costs and for such other and further relief as may appear just and proper.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Farr Sugar Corporation
and American Spirits, Inc. Respond-
210 ents-Impleaded,
Office & P. O. Address,
99 John Street,
New York, New York.

(Verified by E. M. Jonklass, as Vice-President of Farr Sugar Corporation, one of the respondents-impleaded, on October 18, 1944.)

Stipulation of Facts.

UNITED STATES DISTRICT COURT, 211

SOUTHERN DISTRICT OF NEW YORK.

A 126-101

UNITED STATES OF AMERICA, as owner of the S. S. "NATHANIEL BACON", and as bailee of her cargo,

Libellant,

—against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc.,

Respondent,

ATLANTIC MUTUAL INSURANCE COMPANY, et al., 212

Intervening Petitioner.

A 126-167

BELGIAN OVERSEAS TRANSPORT, S. A., as owner of the M. V. "ESSO BELGIUM",

Libellant,

—against—

UNITED STATES OF AMERICA, as owner of the S. S. "NATHANIEL BACON",

Respondent,

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., et al., 213

Impleaded.

STIPULATION.

An agreement having been reached between the parties to the above proceedings that the collision referred to in the pleadings occurred by reason of mutual fault on the part of the M. V. "Esso Belgium" and the S. S. "Nathaniel Bacon", the following stipulation is entered into for the purpose of facilitating the presentation to the Court for decision of the issue raised between the United States of America, as petitioner, and the owners of the cargo

214 laden on the S. S. "Nathaniel Bacon", as respondents impleaded, by the impleading petition of the United States of America filed on or about May 6, 1944 and the answer thereto of Farr Sugar Corporation and American Spirits, Inc., respondents impleaded, filed on or about November 24, 1944, it having been agreed that disposition of this issue as between the United States of America and said two respondents impleaded will control the disposition of said issue as to other respondents impleaded.

For the purpose of this submission, it is therefore stipulated:

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1. The collision between the M. V. "Esso Belgium" and the S. S. "Nathaniel Bacon" on November 24, 1942, referred to in the pleadings herein, occurred by reason of negligence and fault in navigation on the part of both vessels, and the said collision and any loss or damage sustained by any of the parties hereto as a result of said collision occurred without the act, fault or neglect of the shippers, consignees, owners or insurers of cargo laden on the S. S. "Nathaniel Bacon", their agents, or their servants.

216 2. At and prior to the beginning of the voyage upon which said collision occurred and at all other material times, the "Nathaniel Bacon" was seaworthy, properly manned, equipped and supplied, and her holds and other parts of the vessel in which goods were carried were fit and safe for their reception, carriage and preservation, and the cargo laden on said vessel was properly stowed, and all steps were properly taken for the protection and preservation of said cargo.

3. The respondents impleaded, Farr Sugar Corporation and American Spirits, Inc., are, and at all the times

hereinafter mentioned were, corporations organized and 217
existing under and by virtue of the laws of the States of New York and Maryland, respectively, and at the time of the collision between the M. V. "Esso Belgium" and the S. S. "Nathaniel Bacon" were the owners of certain cargo laden on the S. S. "Nathaniel Bacon" and the holders of bills of lading issued therefor by the petitioner United States of America as carrier as follows:

B/L Nos.	Shipper	Consignee	Cargo
85-86	Farr Sugar Corporation	Farr Sugar Corporation	15,200 bags sugar
55-60	Cia. Ron Carioca Destileria, Inc.	American Spirits, Inc.	600 bbls. rum

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Said bills of lading were in form identical with the bill of lading a copy of which is annexed to the impleading petition of the United States hereinbefore referred to and copies will be produced, if required. The said cargo of the respondents impleaded sustained damage as a result of the collision and the remaining value thereof was subjected to liability to contribute in general average to salvage and other expenses incurred by reason of the collision. Upon arrival of the S. S. "Nathaniel Bacon" at a pier in New York Harbor for the discharge of cargo 219
following the aforesaid collision, the aforesaid cargo, in damaged condition as a result of the collision, was delivered to the aforesaid respondents impleaded, respectively, upon delivery to the United States of America, as carrier, by the respondents impleaded of the original bills of lading, and general average bonds, secured by underwriters' guarantees, by the terms of which respondents impleaded agreed to pay the proper proportions of general average charges shown by a proper statement to be due in respect of the cargo owned by and delivered to them respectively as aforesaid. Said respective con-

220 signees demanded and received delivery of the foregoing cargo under the said bills of lading.

4. The intervening libellants, The Home Insurance Company, a corporation duly organized and existing under the laws of the State of New York, and Insurance Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania, intervening libellants in this case, insured the aforesaid cargo of the respondent impleaded Farr Sugar Corporation, and have paid to Farr Sugar Corporation the amount of its loss by reason of damage to said cargo resulting from the col-
221 lision, and pursuant to their underwriters' guarantees given as hereinbefore referred to have paid on behalf of Farr Sugar Corporation the proper proportion of general average charges shown by a proper statement to be due in respect of said cargo. By reason of such payments said intervening libellants, The Home Insurance Company and Insurance Company of North America, have become and are subrogated to the rights of Farr Sugar Corporation to recover from the M. V. "Esso Belgium" damages by reason of such loss and contribution to general average charges by reason of the said collision.

222 5. The intervening libellant, The Home Insurance Company, a corporation duly organized and existing under the laws of the State of New York, insured the aforesaid cargo of the respondent impleaded American Spirits, Inc. and has paid to American Spirits, Inc. the amount of its loss by reason of damages to said cargo resulting from the collision, and pursuant to its underwriters' guarantee given as hereinbefore referred to has paid on behalf of American Spirits, Inc. the proper proportion of general average charges shown by a proper statement to be due in respect of said cargo. By reason of such payments said intervening libellant, The Home Insurance Company, has be-

come and is subrogated to the rights of American Spirits, Inc. to recover from the M. V. "Esso Belgium" damages by reason of such loss and contribution to general average charges by reason of the said collision. 224

6. By reason of the aforesaid collision, the intervening libellants, The Home Insurance Company and Insurance Company of North America, as subrogees to the rights of Farr Sugar Corporation, are entitled to recover and to have a decree against the M. V. "Esso Belgium", her claimant and stipulators, for 100% of the provable damages of Farr Sugar Corporation, including physical damage and general average contributions, excluding interest, which by agreement is not recoverable on the damages, except as from the date of entry of the final decree. 223

7. By reason of the aforesaid collision, the intervening libellant, The Home Insurance Company, as subrogee to the rights of American Spirits, Inc., is entitled to recover and to have a decree against the M. V. "Esso Belgium", her claimant and stipulators, for 100% of the provable damages of American Spirits, Inc., including physical damage and general average contributions, excluding interest, which by agreement is not payable on the damages, except as from the date of entry of the final decree. 225

8. Upon payment of the liability of the M. V. "Esso Belgium" to The Home Insurance Company and Insurance Company of North America, as set forth in paragraph 6 hereof, and payment of the liability of M. V. "Esso Belgium" to The Home Insurance Company, as set forth in paragraph 7 hereof, Belgian Overseas Transport, S. A., claimant and owner of the M. V. "Esso Belgium" is entitled to set off, recoup or recover against the United States of America, as owner of the S. S. "Nathaniel Bacon", in the settlement of liability for collision dam-

226 ages resulting from the aforesaid collision, the sums of $15,981.18 and $287.68, respectively, by reason of such payments.

9. Petitioner, United States of America, as carrier, by its impleading petition demands of Farr Sugar Corporation and American Spirits, Inc., indemnity against its said loss, damage, and liability to M. V. "Esso Belgium" or her owner, consisting of the said sums of $15,981.18 and $287.68, respectively, as hereinbefore set forth, by virtue of the provisions of paragraph 9 of the bills of lading set forth in paragraph Seventh of its impleading
227 petition, which reads as follows:

> "9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners
> 228 of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.
>
> The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

10. The respondents impleaded, Farr Sugar Corporation and American Spirits, Inc., deny that they are under

any liability to indemnify the petitioner, United States 229
of America, against liability to the M. V. "Esso Belgium" or her owner, as demanded in the petition (See Answer, Paragraph Eighth), and further allege that the provisions of paragraph 9 of the bills of lading on which the petitioner's demand is based, are invalid, illegal, contrary to the Statutes of the United States, and contrary to public policy, and therefore void and of no legal effect.

11. At all times during the voyage on which the collision occurred the S. S. "Nathaniel Bacon" was owned by the United States of America (War Shipping Administration) and operated by the War Shipping Administration, 230
which, with respect to the operation thereof on the voyage in question, was engaged as a common carrier in the commercial carriage of merchandise by sea for hire. The bills of lading referred to herein were issued and delivered to the shippers by New York and Porto Rico Steamship Company as agent of, and for account of War Shipping Administration, as such carrier aforesaid.

12. The rights of the other insurance companies who have intervened as libellants are similar to those of The Home Insurance Company and Insurance Company of 231
North America as set forth above with respect to the cargo which they respectively insured, and the claim of the United States against the assureds of said companies is similarly for indemnity with respect to the amounts set off, recouped or recovered by the owner of the M. V. "Esso Belgium" against the United States of America by reason of the recoveries of said insurance companies against the M. V. "Esso Belgium"; and it has been agreed between the parties that the disposition of the claim of the United States against the respondents impleaded Farr Sugar Corporation and American Spirits, Inc., as

232 hereinbefore set forth, will control the claims of the United States against the assureds of such other intervening libellants as the same may be applicable.

13. Since it is contemplated that the rights of all parties to this litigation will be disposed of in a single decree, and all issues have been disposed of by agreement except the issue between the United States of America, petitioner, and respondents impleaded referred to above, the parties hereto respectfully request the Court to adjudicate this issue.

233 Dated: Feb. 1, 1947.

(Signed) JOHN F. X. McGOHEY,
U. S. Attorney,
By VINCENT A. CATOGGIO,
Spec. Ass't.,
Proctors for Libellant and Petitioner,
United States of America.

(Signed) KIRLIN, CAMPBELL, HICKOX & KEATING,
Proctors for M. V. "Esso Belgium."

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(Signed) BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Intervening Petitioners, Atlantic Mutual Insurance Company, et al. and respondents-impleaded, Farr Sugar Corporation and American Spirits, Inc., et al.

Testimony.

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[SAME TITLE.]

New York, December 21, 1948, 2:30 P. M.

Before—Hon. Harold R. Medina, *D. J.*

Appearances:

John F. X. McGohey, Esq., United States Attorney,
Proctor for United States of America 236
and

Burlingham, Veeder, Clark & Hupper, Esqs.,
Edward L. Smith, Esq., Special Assistant to the Attorney General,
John Galey, Esq., of Counsel.

Bigham, Englar, Jones & Houston, Esqs.,
Proctors for Intervenors,
Leonard J. Matteson, Esq., and
Richard F. Shaw, Esq., of Counsel.

Kirlin, Campbell, Hickox & Keating, Esqs., 237
Proctors for Respondents,
Cletus Keating, Esq.,
Edward S. Murphy, Esq., and
Louis J. Gusmano, Esq., of Counsel.

The Court: Gentlemen, before we start there is one thing I seem to have to put in these cases, and I want to get straightened out. I noticed in looking over the file here that perhaps in some way or another these insurance companies—I think I have a hundred shares of stock in the Fidelity. I cannot even remember the name of it now. Is it Fidelity Phenix?

238 Mr. Keating: It could not possibly make any difference.

The Court: Fidelity Phenix, and I don't know how far that may be involved in the matter. I want to say that. I cannot think of anybody else connected with it that I have anything to do with, so I state that fact. If you gentlemen think that I ought not to hear the case, or if you think you should explain what bearing that company has on it, I will be very glad to disqualify myself.

Mr. Keating: I should think it made absolutely no difference one way or the other.

Mr. Galey: I agree with that, if the Court please.

239 The Court: I hope I don't discover any others here because I haven't been through all the papers. I notice there is this Insurance Company of North America in there. I had two or three cases for them when I was at the bar, but, goodness, I cannot imagine that that has any bearing on the case at all.

You may go right ahead and make such opening statements as you care to so that I may be further advised what I have to decide.

Mr. Smith: If your Honor please, these proceedings arise out of a collision between a Government-owned ship, the "Nathaniel Bacon", and a ship owned by Belgian
240 Overseas Transport, the "Esso Belgium".

The proctors have agreed as of a considerable time ago that the collision was both to blame. We did have a slight difference in the distribution of damages, which was intended to discount the possibilities of a trial, but we are in essential agreement as to both to blame for the collision, and most of the damages have been adjusted, and a stipulation will be put in evidence which states the percentage of the total damages which each ship is to bear.

I represent the Government, and about the only question which has not been disposed of by agreement is the question of the Government ship's liability to its own

cargo, and the reason that that question has not been 241
disposed of is because the cargo was moving under a bill of lading which contains a so-called both to blame collision clause.

That clause provides, in effect, that the cargo shall pay the carrying ship any amounts which the carrying ship is obliged to pay any other ship on account of liability for damage to it.

The Court: Is that paragraph the one that appears on page 6 of the stipulation dated February 1, 1947?

I wonder if you might pause just a moment until I read that? I had started reading the stipulation but had not 242
quite got down to that clause, and I think if I read it to myself before you proceed, it will help me a little bit.

(A pause.)

The Court: The net result of that seems to be that the owners of the cargo or the subrogees of the owners of the cargo would be without remedy.

Mr. Smith: The cargo would bear the ship's proportionate liability and could only collect what could be collected from the other vessel in the event of a both to blame collision.

But if I may continue, perhaps.

The Court: Yes, do so. 243

Mr. Smith: The Government in its case happens to have what amounts to a cost plus insurance against liabilities of this sort, cargo damage, and personal injury and life, and that insurance entitles us to the benefit of very eminent counsel with respect to that aspect of the case, Mr. Galey here.

My interest is solely to see to it that the stipulation, in so far as it affects the other liabilities, about which we are in substantial agreement, and about which I don't think your Honor will be concerned, is in proper order, and that the decree properly recites the agreement with respect to those matters, and to participate as a matter

244 of interest in this very interesting question of the validity of a both to blame collision clause, but the Government proposes to leave to its counsel the question of determining that issue which bears upon its liability in the Government underwriting.

Mr. Murphy: If the Court please, I represent Mr. Keating and I represent the "Esso Belgium", the other side of the collision case. There is only one detail to be added to what Mr. Smith has just told your Honor, and that is the formal stipulation which is not included in this long stipulation your Honor has looked at. We all stipulate that ownership of both vessels is as alleged in
245 the pleadings. So that that detail is covered.

After that your Honor will hear argument on the both to blame clause.

The parties in this case come to your Honor for an interlocutory decree in the usual form of a collision case, on the libel and cross-libel, after your Honor has determined the major point of law under the both to blame clause.

Mr. Galey: If the Court please, I think it might be helpful if I stated to you very briefly what the pleadings are.

246 This collision took place in New York Harbor in November, 1942. The "Nathaniel Bacon", owned by the United States, was inbound from Puerto Rican ports with a cargo. She was struck by the "Esso Belgium" and she had to be beached on Red Hook Flats, and as a result of that casualty, considerable damage was sustained by the cargo of the "Bacon" and general average disbursements were incurred in minimizing or lessening the damage.

After the collision a libel was filed by the United States against the "Esso Belgium" for the damages of the "Nathaniel Bacon". A cross-libel was promptly filed by the owners of the "Esso Belgium" for the damage sustained by the "Esso Belgium".

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The next step was a petition for intervention by the underwriters, the insurers of the cargo on the "Nathaniel Bacon", who had paid or had become liable for the losses sustained by the cargo. Under that petition the various underwriters sought to become co-libelants against the "Esso Belgium" and her owners.

The next step was the filing of a petition by the United States, as cross-respondent under the cross-libel.

As it appeared to be a case where both ships might be to blame, the United States impleaded her own cargo under this cross-liability clause or this both to blame clause.

248

The Court: Would you pause just a moment there to let me straighten this out? There seems to be two cases here, A. 126-101 and A. 126-167. A. 126-101, the file of that case has in it all the pleadings that you have just referred except that I do not identify the last one, and I want to just glance through here and have it before me.

Mr. Galey: See if that has a number. The impleading petition, I think, is No. A. 126-167.

The Court: Oh, well, then that is the reason I have that little confusion. This last step is given a separate number.

249

Mr. Galey: Yes, apparently.

The Court: Let me look in the other file.

Mr. Galey: Oh, I see, one is the libel, you see. 126-101 was the Government's libel against the "Esso Belgium". Then when the cross-libel was filed, it was given a separate number, A. 126-167, and this impleading petition was filed under the cross-libel. So that, although the two proceedings are tried together, the two cases, and although they are to be dealt with in a single decree, they do have two numbers in the files because the libels were filed at different times?

The Court: Yes. Have they been consolidated?

250 Mr. Galey: I don't think so. I don't believe we usually do that in admiralty. We just try the cases together and dispose of them in a single decree.

The Court: Very well. Let me just straighten myself out with this. 126-167; I find the paper that you describe as the cross-libel.

Mr. Galey: Entitled Belgian Overseas vs. the United States.

The Court: The relief that is prayed for there——

Mr. Galey: Is merely for the collision damage sustained by the "Esso Belgium".

The Court: Yes—sustained, rather, by the other vessel,
251 the "Nathaniel Bacon".

Mr. Galey: No, in the cross-libel. You see, the Belgian Overseas Transport was the owner of the "Esso Belgium".

The Court: Oh, yes, the cross-libel is the cross-libel of the Belgian—— .

Mr. Galey: Overseas Transport, which was the owner of the "Esso Belgium". That seeks to recover any damages which it may suffer through the collision from the United States, the owner of the "Nathaniel Bacon".

The Court: Yes, and then the next step is the petition of the United States as owner of the "Nathaniel Bacon",
252 which is called impleading petition.

Mr. Galey: Yes, it impleads the owners of its cargo as respondent. You see, as a respondent——

The Court: Yes.

Mr. Galey: (Continuing) —it may become liable to Belgian Overseas, and it impleads its own cargo in order to recover from its cargo such part of the recovery that Belgian has——

The Court: I have it. Let me read to myself the prayer for relief in this impleading petition of the United States of America as owner of the "Nathaniel Bacon".

(A pause.)

The Court: Very well.

Mr. Galey: Of course, the basis of the impleader is 253
the clause which we are submitting to your Honor, the both to blame collision clause.

In order to be as clear as I can on how this clause originated, how it came about, and its purpose, I have to go back a little bit.

(Discussion with respect to the both to blame collision clause not transcribed.)

The Court: We are going to recess now until tomorrow morning at 10:30.

(Adjourned to December 22, 1948, at 10:30 a. m.)

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New York, December 22, 1948,
10:30 o'clock a. m.

Trial resumed.

(Discussion with respect to the both to blame collision clause not transcribed.)

The Court: We are going to have the record show an adjournment to January 3rd, but I will have my secretary inform you of the actual date when we may continue.

255

New York, January 11, 1949,
2:30 o'clock p. m.

Trial resumed.

(Discussion with respect to the both to blame collision clause not transcribed.)

The Court: That is where we are going to stop. We will go on from there tomorrow morning.

(Adjourned to 10:30 A. M., January 12, 1949.)

New York, January 12, 1949,
256 10:30 o'clock a. m.

Trial resumed.

(Discussion with respect to the both to blame collision clause not transcribed.)

The Court: You have some proof to put in here, gentlemen, as I understand it, and I think we will take a short recess while you get your stipulations, and whatever it is you desire to put in, ready, and then we will conclude the case.

(Short recess.)

257 Mr. Galey: I would like to offer in evidence the stipulation as to facts.

(Marked Libelant's Exhibit 1.)

Mr. Galey: Mr. Matteson and I have agreed with respect to the proof of foreign law, if necessary, in substance, to apply Section 344(a) of the code—perhaps I should read his letter so that we will have the stipulation as it is.

The Court: I think if you merely offer the paper in evidence with your preliminary statement, it may suffice,
258 but do it your way.

Mr. Galey: The letter contains some other things. The stipulation is embodied in only one paragraph.

The Court: Very well.

Mr. Galey: The stipulation is as follows:

With respect to the foreign law, particularly English, with respect to collision liability on the carriage of goods by sea, we agree with you that it will be desirable and proper for both sides to be able to refer to British cases, or pages from standard British textbooks on the subject.

We are entirely agreeable to stipulating that either party 259
or the Court may refer to the opinions of British courts, or to the textbooks, or statutes in proof of British or other foreign law so far as the same may be pertinent to the consideration of this case.

I understand that applies not only in the District Court but on appeal.

Mr. Matteson: Of course.

Mr. Galey: There was a general average adjustment prepared in this case. I don't want to burden the record with the adjustment. The only purpose of offering it would be to show, in this particular case, where general 260
average contributions form a part of the amount in litigation, the sacrifices and the expenses of the ship exceed the expenses and sacrifices of the cargo, so there would have been a balance to the ship. I understand that is conceded, Mr. Matteson?

Mr. Matteson: That is correct. Of course, there were sacrifices and expenses on both sides, your Honor, the subject of distribution in general average.

The Court: Very well.

Mr. Galey: But the amount of the ship's sacrifices was greater than the cargo's.

I offer in evidence the record of the hearings before 261
the Committee on Commerce of the Senate on Bill S-1152, which was the bill relating to the carriage of goods by sea.

The Court: Of the Senate?

Mr. Galey: This is the Senate. These are the hearings before the Senate. I assume your Honor would like to have me offer the whole pamphlet in evidence.

The Court: I think so. I think I would find it helpful.

(Marked Libelant's Exhibit 2.)

Mr. Galey: I offer in evidence the report of that committee after the conclusion of the hearings.

(Marked Libelant's Exhibit 3.)

262 Mr. Galey: I offer a pamphlet containing the report of the hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives on the same bill before which the same proposed amendments with respect to the both to blame collision clause were proposed.

(Marked Libelant's Exhibit 4.)

Mr. Galey: I offer the report of the Committee on Merchant Marine and Fisheries rendered after the hearings with respect to the same bill.

263

(Marked Libelant's Exhibit 5.)

Mr. Galey: I should like to offer also the report of the delegates of the United States to the International Conference on Maritime Law, at which the Hague Rules were first considered.

Mr. Matteson: Are you offering the document or a photostat?

Mr. Galey: I am offering a photostat, not the original document.

264 (Marked Libelant's Exhibit 6.)

Mr. Galey: I should also like to offer Senate Executive Report No. 2, approving the International Convention for the Unification of Rules relating to bills of lading, which contains some comment, which I think your Honor will find useful, on the history of this matter.

The Court: What was it they approved?

Mr. Galey: The convention.

The Court: Not the Hague Rules?

Mr. Galey: It is the Hague Rules Convention on which——

The Court: That is all I need. Just for my notes. 265

(Marked Libelant's Exhibit 7.)

Mr. Galey: I also offer the Congressional Record, or a portion of it, covering the date April 1, 1935, Proceedings in the Senate, at which the convention was approved by the Senate.

(Marked Libelant's Exhibit 8.)

The Court: I thought the Senate refused to approve?

Mr. Matteson: This is the Hague Rules Convention.

The Court: This is not this 1922 affair?

Mr. Galey: This is the 1922 affair, not the 1910 affair. 266

The Court: What was it Mr. Matteson was telling was so significant about something not submitted to the Senate until, as he put it, 1937?

Mr. Matteson: That was the Collision Convention of 1910.

The Court: Oh, that is the Collision Convention of 1910. Well, I had a feeling I had something mixed up there because those dates did not fit in. All right.

Mr. Galey: I also offer the statement in tabular form from Mr. Knauth's book, which we have both agreed on as stating the ratifications and adherences to the convention with respect to the Hague Rules and cargo liability. 267

(Marked Libelant's Exhibit 9.)

Mr. Galey: Since the Brussels Convention has been mentioned, I offer certain pages from the work of Mr. Benedict on American admiralty, which indicates what that document is. That has been referred to in the document and this will indicate what it is and the extent of the adherences to it and ratifications.

(Marked Libelant's Exhibit 10.)

268 Mr. Matteson: That is No. 10 in your list isn't it?

Mr. Galey: I don't know whether that is—no, no, that is not. It may have been; I don't know what the numbers were.

Mr. Matteson: May I see the document?

Mr. Galey: Yes, it is one that I think was——

Mr. Matteson: Yes, that is right.

Mr. Keating: Collision?

Mr. Matteson: Yes.

Mr. Galey: I think, for your Honor's convenience, perhaps I had better offer in this short form the British
269 Carriage By Seas Act because that has been referred hereto. It will save your Honor looking in the books for it.

(Marked Libelant's Exhibit 11.)

Mr. Galey: And the Canadian Water Carriage Goods Act, 1936, I offer that.

(Marked Libelant's Exhibit 12.)

Mr. Galey: I think that completes our proof—oh, yes,
270 there is one other matter that I should like to put in and that is page 319 and the following pages of the Bulletin No. 65 of the International Committee Gottenborg Conference, which contains in convenient form the original Hague Rules, with the showing of the subsequent amendments to those rules at each of the conferences that have been referred to, and the convention as finally adopted. The changes are indicated in red and blue in the document so they will be easy to identify.

(Marked Libelant's Exhibit 13.)

Mr. Matteson: If your Honor please, Mr. Galey, in advance of the trial, furnished me a list of some seventeen

documents that I understood he was offering. Some of 271
them he has not offered and, since he has not, I want to offer them, and I have one or two additions.

The first one is photostatic excerpts from the hearings of the subcommittee on Foreign Relations of the United States Senate, 75th Congress, relating to the Collision Convention of 1910, hearings in 1938.

The Court: What is the paper designated?

Mr. Matteson: It is designated Hearings before subcommittee of Committee on Foreign Relations of the Senate. The title is a long one.

The Court: I don't need any more.

Mr. Matteson: It is the Brussels Convention, 1910. 272

Mr. Galey: I think that is already in evidence.

Mr. Matteson: I missed it. It was among the things you intended to offer but I don't think you did.

Mr. Galey: Yes, I offered the convention.

Mr. Matteson: Yes, but not the hearings before the Senate Committee.

Mr. Galey: No.

The Court: That is the Senate Committee on Foreign Relations, isn't it?

Mr. Keating: That is right.

The Court: I don't think that has been offered.

There have been the Committee on Commerce and the 273
Committee on Merchant Marine and Fisheries of the House.

Mr. Matteson: I am sure——

The Court: I don't think that was offered.

Mr. Matteson: (Continuing)—this was not offered. I would like to offer that in two parts, if I may, because the first part is excerpts which were supplied me by Mr. Galey, and the second part consists of additional excerpts that I had myself selected from the record.

The Court: Mr. Galey's selections will go in as A and your selections will go in as B.

274 Mr. Matteson: Mr. Galey, would you have any objection to supplying the Court with a copy, because the only copy I have is the copy you supplied me?

Mr. Galey: I have only the parts that I offered, and those were the parts which contained the convention, which I have already offered in evidence, and the statement of ratifications, pages 1 to 13. I don't know what parts you want to offer, whether you want to hand this up to the Court——

The Court: Mr. Matteson has in his hands two photostatic pamphlets, one of which he desires to have considered separately from the other, and his trouble is
275 that he will not have a copy of one of them for himself if he marks the one he holds in his hand in evidence.

Mr. Galey: I will see that he gets this and he can make a copy for himself.

The Court: And he can offer the ones he has in his hand in evidence. The first one represents excerpts selected by Mr. Galey, and that will go in as Exhibit A, and the second one, which represents excerpts selected by Mr. Matteson, will go in as Exhibit B, and then everybody will be happy in anticipation of the fact that Mr. Matteson will receive another copy so that
276 he can work on that when he is getting up his brief.

(Marked Intervenors' Exhibits A and B.)

Mr. Galey: May I know what pages you are offering?

Mr. Matteson: Yes, I will furnish you copies. I am just making a note of the page numbers that refer to your copy. Here is A and here is B, and I will give this copy to Mr. Keating and Mr. Galey.

The second thing is a photostatic excerpt from the Maritime Law Committee of the International Law Association, containing the text of the Hague Rules, 1922, as amended at the London Conference.

Mr. Galey: That is the document I handed up to your 277
Honor in the course of my argument.

Mr. Matteson: And I will have my copy marked and will you supply me with another one of those?

Mr. Galey: Those are already in evidence in these Gottenborg Rules which I offered.

Mr. Matteson: They are in slightly different form and, actually, I think this is very much more convenient.

The Court: Mr. Matteson has marked up this one in different colored pencil.

Mr. Matteson: Mr. Galey did it.

The Court: That is all right. I have no objection 278
at all. I appreciate the reason why so many lawyers raise a terrible hullabaloo if somebody marks something. I find it very helpful if a man will mark parts he wants to draw to my attention.

Mr. Galey: Those marks were taken in the same colors from the original document. The photostat did not reproduce the colors of the original markings.

The Court: I see. I did not know what the significance of the colors was.

(Discussion off the record.)

(Marked Intervenors' Exhibit C.) 279

Mr. Matteson: The next thing is a copy of the Merchant Shipping Act of 1911.

Mr. Galey: Is that the Maritime Conventions Act?

Mr. Matteson: Maritime Conventions Act.

(Marked Intervenors' Exhibit D.)

Mr. Matteson: That is taken from McLaughlin's Law of Merchant Shipping.

The next thing is a photostatic excerpt from the proceedings of the Maritime Law Committee at The Hague

280 in 1921, pages 31 to 34 inclusive, to which I referred in my argument, and they are taken from a volume which belongs to the library of Columbia Law School and, consequently, I am not able to furnish that.

(Marked Intervenors' Exhibit E.)

Mr. Galey: What is the number of that bulletin?

Mr. Matteson: It does not seem to have a bulletin number, but the outside of the volume says "30th Report, Hague."

Mr. Galey: I haven't seen this document before but I assume—

281 Mr. Matteson: I have the volume temporarily here for your inspection.

Mr. Galey: If there is anything we haven't put in that we would like to put in, I suppose we would have the opportunity to do it after we have examined it?

Mr. Matteson: That is agreeable to me.

The Court: You had better go ahead and put in what you want, and we won't have any blanketing that will leave everything in confusion; but if anybody has something that, before briefs come in, he is desirous of adding, he may apply for leave to do that and I have no doubt

282 that I will give him leave.

Mr. Matteson: I suppose all these documents do come within the stipulation we made at the outset, and they can be referred to by counsel or the Court, but it will be very convenient to have them in the record.

The Court: Concerning this paper, you started to say "30th Report," and I like to put down in my notes a brief but accurate description of each exhibit.

Mr. Matteson: It is Report of the 30th Conference, International Law Association, Volume II. It is the proceedings of the Maritime Law Committee relating to the adoption of the Hague Rules, 1921.

(Marked Intervenors' Exhibit F.)

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The Court: When you say, "International Maritime Committee" and then you say "Maritime Law Committee," do you mean the same thing?

Mr. Matteson: Yes.

(Discussion off the record.)

Mr. Galey: With respect to this last exhibit which was offered——

The Court: Bulletin 27?

Mr. Galey: Yes, it consists of certain excerpts from this bulletin, beginning at page 476. If this is to be offered, I should like to offer certain other pages which relate to the same subject matter, and how your Honor 284 wants those to be offered or how do you want them to go in, I don't know, but I have the document here and I can indicate the pages, I have them marked now, or they can be marked later in rebuttal, in which case they will be separated from the exhibit itself.

The Court: I really think it will be easier if you will put them in in rebuttal, having already indicated on the record the relationship.

Mr. Matteson: Would you mind indicating to me the pages that you have in mind, which you propose to refer to?

Mr. Galey: Pages 447, 456 to 458 inclusive, and page 285 475, which just precedes the first page of the respondents' exhibit.

Mr. Matteson: Does that cover it?

Mr. Galey: Yes.

Mr. Matteson: I simply want to be able to make photostats before I send the volume back to Columbia Law Association.

The Court: Do you desire to add those to Exhibit F?

Mr. Matteson: I will be pleased to do that.

Mr. Galey: Yes, I think so.

286 The Court: So you may have the photostats of those pages made and physically add them. If the exhibits are up in my chambers, why, you may just add them there; or if they are down here with the Clerk, do it here, wherever they are.

Mr. Matteson: I will have the photostats of the additional pages made in the next day or two and have somebody come up to your chambers and hand them to you.

The Court: Both sides rest?

Mr. Galey: Rest.

287 The Court: What did we fix about the time for briefs? The date of the original briefs was February 10th, was it?

Mr. Keating: The 10th, I suggested, sir.

The Court: And you suggested some date in April?

Mr. Keating: April 1st.

The Court: All right, all briefs to be in four p. m., April 1st.

Libelant's Exhibit 1.

288 Identical with Stipulation of Facts, printed herein at pages 71 to 78.

Libelant's Exhibit 2.

Record on the hearings before the Committee of Commerce of the Senate on Bill S-1152.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 3.

289

Report of Committee of Commerce of the Senate after hearings.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 4.

Report of the hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives. 290

(Omitted pursuant to stipulation.)

Libelant's Exhibit 5.

Report of the Committee of the Merchant Marine and Fisheries after hearings.

(Omitted pursuant to stipulation.) 291

Libelant's Exhibit 6.

Report of the delegates of the United States to the International Conference on Maritime Law.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 7.

292 Senate Executive Report No. 2, approving the International Convention for the Unification of Rules relating to bills of lading.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 8.

293 Portion of Congressional Record covering the date April 1, 1935, Proceedings in the Senate.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 9.

Statement in tabular form from Mr. Knauth's book as to ratifications and adherences to the convention with respect to the Hague Rules and cargo liability.

294

(Omitted pursuant to stipulation.)

Libelant's Exhibit 10.

Portions of Mr. Benedict's work on American Admiralty.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 11.

295

British Carriage By Seas Act in short form.

(Omitted pursuant to stipulation.)

Libelant's Exhibit 12.

Canadian Water Carriage Goods Act, 1936.

(Omitted pursuant to stipulation.)

296

Libelant's Exhibit 13.

Page 319, et seq., of Bulletin No. 65 of the International Committee Gottenborg Conference.

(Omitted pursuant to stipulation.)

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Intervenors' Exhibits A and B.

Excerpts from the hearings of the subcommittee on Foreign Relations of the United States Senate, 75th Congress, relating to the Collision Convention of 1910, hearings in 1938.

(Omitted pursuant to stipulation.)

Intervenors' Exhibit C.

298

Excerpt from the Maritime Law Committee of the International Law Association, containing the text of the Hague Rules, 1922, as amended at the London Conference.

(Omitted pursuant to stipulation.)

Intervenors' Exhibit D.

299

Merchant Shipping Act of 1911.

(Omitted pursuant to stipulation.)

Intervenors' Exhibit E.

Excerpt from the proceedings of the Maritime Law Committee at The Hague in 1921, pages 31 to 34 inclusive.

(Omitted pursuant to stipulation.)

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Intervenors' Exhibit F.

Report of the 30th Conference, International Law Association, Volume II.

(Omitted pursuant to stipulation.)

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[SAME TITLE.]

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MEDINA, *D. J.*

This litigation arises out of a collision which occurred in New York Harbor on November 24, 1942, between the

304 S.S. "Nathaniel Bacon" and the M/V "Esso Belgium." As a result of the collision both the vessels and the cargo aboard the "Nathaniel Bacon" sustained damage.

The first action was instituted by libellant United States of America, as owner of the "Nathaniel Bacon" and as bailee of her cargo, against the "Esso Belgium" seeking to recover for the damage done to the "Nathaniel Bacon" and to her cargo. Certain insurance companies which had paid the cargo owners their losses intervened as libellants to assert the subrogated rights of the cargo owners against the "Esso Belgium."

The second action is a cross-libel filed by the owner of
305 the "Esso Belgium" seeking to recover from the United States as owner of the "Nathaniel Bacon" for the damage suffered by the "Esso Belgium," including the amount it might be held liable to pay for damage to the cargo aboard the "Nathaniel Bacon." The United States then impleaded the owners of the cargo aboard the "Nathaniel Bacon," only two of whom have appeared, seeking indemnity from them pursuant to the provisions of the so-called "Both-to-Blame" clause contained in the bills of lading issued by the "Nathaniel Bacon" to them. The clause is commonly used in ocean carriers' bills of lading
306 and was designed to correct a curious anomaly resulting from the inter-relation of certain rules of Admiralty Law.

By virtue of the provisions of §3 of the Harter Act, 46 U. S. C. A. §192 (1928), and §4 (2)(a) of the Carriage of Goods by Sea Act, 46 U. S. C. A. §1304 (1944), the carrier is not liable to the owner of cargo laden aboard her for damage to cargo resulting from negligence of the carrier's servants in the management of the ship. The risk of loss due to such damage must be borne by the cargo owner. However, if the damage to cargo results from the concurrent negligence in navigation of the carrier and of some other ship, that is where two

ships are to blame, the owner of the cargo may recover 307
his entire damages from the other ship. *The New York*, 175 U. S. 187 (1899); *The Atlas*, 93 U. S. 302 (1876); see *The Chattahoochee*, 173 U. S. 540, 549 (1899).

In addition, each ship has a right of action against the other in admiralty for negligence. In such an action the damages suffered by the two ships are equalized. Each ship is liable for one-half of the total damages: a balance is struck by requiring the ship suffering the least damages to pay to the other ship one-half the difference between the amount of its damages and the amount of the other ship's damages. In striking this 308
balance, the amount paid by the non-carrying vessel to the owners of the cargo aboard the carrier is included as part of the non-carrier's damages. *Erie Railroad Co.* v. *Erie & Western Transportation Co.*, 204 U. S. 220 (1907); *The Chattahoochee, supra.*

The carrier is thus indirectly liable for one-half of the damage suffered by the cargo owners as a result of the negligence of the carrier's servants in the navigation of the ship, despite the immunities of §3 of the Harter Act and §4 (2)(a) of the Carriage of Goods by Sea Act, supra, but *only* when the carrier is *partly* to blame for the damage. When the carrier is entirely to blame then, with 309
respect to damage to cargo, the carrier, by virtue of the statutory provisions above referred to, need pay nothing at all.

To correct this anomalous result, the Both-to-Blame clause provides, in substance, that in a both-to-blame collision, the owners of the goods will indemnify the carrier against all loss or liability to the other ship, in so far as such loss or liability represents loss of, or damage to, or any claim of the cargo owners, paid to them by the other ship, and set-off, recouped or recovered by the other

310 ship's owners as part of her claim against the carrier. The clause is set forth verbatim in the footnote.*

This is the first time that the question of the validity of the contractual provision in its present form has been before the courts. One case, *The W. W. Bruce*, 14 F. Supp. 894 (E. D. N. Y., 1936), sustained the validity of an earlier version of the clause, but was reversed on other grounds, 94 F. 2d 834 (2d Cir. 1938).

The parties have stipulated that the collision occurred "by reason of negligence and fault in navigation on the part of both vessels," and without "the act, fault, or neglect of the shipper, consignees, owners or insurers of
311 the cargo." It is also stipulated that the decision as to the two impleaded cargo owners who have appeared will be determinative of the issue as to the other cargo owners.

Finally, it is stipulated that the intervening insurance companies are entitled to recover 100% of the provable damage of their assureds from the "Esso Belgium" and that the "Esso Belgium" is entitled to include in its claim against the "Nathaniel Bacon" the amounts of $15,981.18 and $287.68 for which it is liable to the intervening in-

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312 * If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

surers. The only issue is whether the United States, as 313
owner of the "Nathaniel Bacon," is entitled to indemnity from the two impleaded cargo owners. Those two owners deny liability to indemnify on the ground that the provisions of the Both-to-Blame clause are "invalid, illegal, contrary to the statutes of the United States and contrary to public policy, and are therefore void."

The validity of the clause is thus squarely in issue.

Despite the maze of intricate and complicated arguments pro and con, which have covered a wide area and a multiplicity of details too numerous for specific reference, the basic problem is a simple one and in its solution 314
will be found an underlying principle which governs the determination of the host of subordinate questions. Prior to the Harter Act it was settled American law that any agreement absolving the shipowner from liability for negligent navigation or negligence in the management and operation of the vessel was void as against public policy. *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397 (1889); *Railway Co.* v. *Stevens*, 95 U. S. 655 (1877); *Railroad Co.* v. *Pratt*, 22 Wall. 123 (1874). This public policy was changed by §3 of the Harter Act, to the effect that, providing there was "due diligence to make the said vessel in all respects seaworthy and properly manned, 315
equipped, and supplied, neither the vessel, her owner, or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." While the language of §4 (2)(a) of the later and here controlling Carriage of Goods by Sea Act eliminated the prerequisite of due diligence to make the vessel in all respects seaworthy and substituted language which exonerated the shipowner from responsibility unless it failed to use diligence to make the vessel seaworthy in some respect proximately causing or contributing to the loss, Knauth, The American Law of Ocean Bills of Lading 135

316 (3d ed. 1947), the change of public policy proclaimed by the Harter Act was continued. As the shipowner was thus relieved of liability to the cargo owner for negligent navigation, and irrespective of whether this be termed an "exemption" or an "immunity," it seems clear to me that there could no longer continue to be any public policy nullifying an agreement absolving the shipowner from liability for negligent navigation. But that is exactly what the Both-to-Blame clause in substance purports to do.

The Congress having spoken in such unequivocal man-
317 ner in §4 (2)(a), on the fundamental question of non-liability of the shipowner generally for negligent operation, it is natural to expect that nothing to be found in the balance of the statutory scheme shall purport to lay down principles inconsistent with §4 (2)(a) and designed to prevent the shipowner from implementing the public policy thus declared wherever, for procedural or other reasons, the policy of the statute is not self executing. Nor can I, after the most careful and painstaking investigation of the entire matter, find any such inconsistency in the portions of the Carriage of Goods by Sea Act urged upon me by the cargo owners, and discussed below. Ingenious as are
318 some of their arguments, I am unable to find that the Both-to-Blame clause offends any provision of the Carriage of Goods by Sea Act or any existing public policy, nor does it seem to me to be in any way unreasonable.

The bills of lading provide that they are drawn pursuant to the provisions of the Carriage of Goods by Sea Act, supra, a stipulation authorized by the statute. Two specific sections thereof are relied on by the cargo owners as invalidating the clause: §4 (3), and §3 (8). §4 (3) provides:

> The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising

or resulting from any cause without the act, fault, 319
or neglect of the shipper, his agents, or his servants.

It seems clear to me that §4 (3) was never intended to have any application whatever, directly or indirectly, to the general subject of damage to cargo, or to any agreement, such as is contained in the Both-to-Blame clause, indemnifying the carrier against loss or liability representing "loss of, or damage to, or any claim whatsoever of the owners of said goods." A reading of §4 as a whole confirms this view; and it is axiomatic that the various parts of a statute such as the Carriage of Goods by Sea Act must be read together as parts of a composite whole. 320

Moreover, it is significant that when the statute was before the Congress, it was proposed that §4 (3) be amended in such fashion as specifically to invalidate the Both-to-Blame clause. See Hearing Before the Committee on Commerce, United States Senate, 74th Cong., 1st Sess., (1935), pp. 52-59, 61-63; Hearings Before the Committee on Merchant Marine and Fisheries, House of Representatives, 64th Cong., 2d. Sess., (1936) pp. 49-68. That proposal was rejected.

I conclude that reading the statute as a whole and taking into consideration its legislative history, §4 (3) of the 321
Carriage of Goods by Sea Act does not invalidate the Both-to-Blame clause.

§3 (8) is also relied upon by the cargo owners. That section reads:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void

322 and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Clearly the first sentence prohibits "contracting out" of liability for negligence only if the negligence is in the performance of the duties and obligations provided in §3. §3 imposes no duty or obligation on the carrier in so far as the navigation and management of the ship by its servants is concerned. To the contrary, §4 (2)(a) specifically grants the carrier an immunity from such liability. To construe this section as invalidating "con-
323 tracting out" of negligence generally would be to disregard the plain meaning of the language, other relevant sections of the statute, its legislative history, see Hearings on S. 1152, Committee on Merchant Marine and Fisheries, House of Representatives, 74th Cong., 2d. Sess., p. 11 (1936), and the construction placed on the statute's predecessor section in the Harter Act, see *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 272, 277-78 (1898); *The Irrawaddy*, 171 U. S. 187, 190 (1898); *McNamara & Son* v. *Hatteras*, 38 Ll. L. L. R. 233, 234 (1930).

The second sentence of §3 (8), dealing with benefit of
324 insurance, is no more applicable than the first. The legislative background, see Bulletin No. 57, International Maritime Committee, pp. 474-5 (Antwerp, 1923), and the cases illustrating the evil at which the provision was directed indicate that a benefit of insurance clause is invalid only when it requires the cargo owner to insure himself against a loss resulting from the carrier's failure to perform an essential duty of his employment. *Phoenix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312, 322 (1886); *The Hadji*, 20 Fed. 875 (1884). Since the carrier cannot relieve himself of such liability directly, he cannot do so indirectly by requiring the cargo owner to insure against it.

Similarly, the statute declares that a benefit of insurance shall be deemed to be a clause relieving from liability, but invalidates such clauses only by virtue of the first sentence of §3 (8). I have held above that the Both-to-Blame clause does not run afoul of the rule laid down in that sentence, because it does not deal with the duties and obligations of the carrier provided in §3 of the Act. 325

It follows that neither §4 (3) nor §3 (8) invalidates the contractual provision being considered.

That provision is also attacked on the ground that it relieves the carrier from liability for negligence, and is, therefore, void and contrary to public policy, *Liverpool Steam Co.* v. *Phenix Insurance Co., supra; Railway Co.* v. *Stevens, supra; Railroad Co.* v. *Pratt, supra,* notwithstanding the provisions of the Harter and Carriage of Goods by Sea Acts. This argument must be rejected. 326

§3 of the Harter Act effected a change in the policy of the law. See *The Jason,* 225 U. S. 32, 53, 55 (1912); *The Irrawaddy, supra,* at 193. Contractual provisions which would formerly have been invalid because inconsistent with the duty of care in the navigation of the vessel owed by the carrier to the cargo owner were no longer so, since the Harter Act absolved the carrier from liability to the cargo owner for negligent navigation. *The Jason, supra.* 327

The Both-to-Blame clause is applicable only when negligent navigation has caused damage to cargo, and operates to relieve the carrier from indirect liability to the cargo owner for such damage. As in *The Jason, supra,* this is consistent with the policy declared by §3 of the Harter Act, and §4 (2)(a) of the Carriage of Goods by Sea Act. The statutes deprive the cargo owner of any right of action against the carrier for negligent navigation by the carrier's servants, and where there is no enforceable right, it cannot be said that there is any duty. The clause therefore is not inconsistent with the ship-

328 owner's duty of care in navigation. *The Jason* also is ample authority for the proposition that no explicit statutory authorization for a given contractual provision need be found. It is sufficient that the contractual provision is consistent with public policy as declared in the statutes and cases, and is otherwise reasonable.

I know of no other public policy with which the clause is inconsistent. The benefit of insurance cases are inapplicable, since, as pointed out in discussing §3 (8) of the Carriage of Goods by Sea Act, such clauses are invalid only when the clause indirectly relieves the carrier of an essential duty owed to the cargo owner. No such duty
329 is here involved. The *Ansaldo San Giorgio* v. *Rheinstrom Co.*, 294 U. S. 494 (1935) is inapposite, since it dealt with the duty of care in the stowage of the goods. Neither statute relieves the carrier of liability for negligence in the performance of this duty. Cf. §3 (2) of Carriage of Goods by Sea Act, *supra*.

Neither the *Chattahoochee*, *supra*, nor *Erie Railroad Co.* v. *Erie & Western Transportation Co.*, *supra*, announce any public policy with which the Both-to-Blame clause conflicts. They hold that §3 of the Harter Act did not purport to affect the rights of the carrier as against
330 another ship when both had been negligent and a collision between them occurred. The non-carrying ship was still entitled, in a division of damages, to reimbursement by set-off or recoupment of one-half of what it had paid to the owners of cargo aboard the carrier. This rule remains unaffected by the workings of the Both-to-Blame clause, and the burdens resulting from the collision of two negligently navigated ships will continue to be allocated as in the past. The fact that the carrier recovers part of what it loses in the division of damages from some other source does not subvert the principles implicit in the rule of these two cases.

Concededly, the Both-to-Blame clause produces a result 331
which is inconsistent with that reached by the application of the *Atlas* rule, as in *Aktieselskabet Cuzco* v. *Sucarseco*, 294 U. S. 394 (1935). That case held that the cargo owner, in asserting his claim against the non-carrying ship, may recover the amount for which he is liable to the carrier as a contributor to general average. But neither in that case, nor in the cases where the *Atlas* rule was earlier propounded and developed, was there any contractual provision involved which would alter the result effected by the application of the *Atlas* rule. There is nothing in these cases which requires me to invalidate such a contractual provision as is before me, provided 332
the provision is otherwise "just and reasonable." *Express Co.* v. *Caldwell*, 21 Wall. 264, 266-8 (1874); *Liverpool Steam Co.* v. *Phenix Insurance Co.*, *supra*, at 441-2; *Railroad Co.* v. *Pratt*, *supra*, at 134.

The only remaining question, therefore, is whether it is just and reasonable for the carrier, by contract, to deprive the cargo owner of 50% of the amount which he receives from the non-carrying ship for the damage caused to cargo, and thus to increase the cargo owner's insurance costs. Cf. *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 148-9 (1918). I conclude that it is. 333

Two rules of law are affected by the operation of the Both-to-Blame clause, and its reasonableness must be appraised in the light of both.

First, it affects the carrier's liability to the cargo owner for damage caused to cargo due to negligent navigation. Cf. *The Cockatoo*, 61 F. 2d 889 (2d Cir. 1932), cert. den. 287 U. S. 669 (1932). In so far as the clause relieves the carrier of this liability it is an implementation of the statutes heretofore discussed. The reasonableness of the clause necessarily follows in so far as it has this effect for it is not for this Court to find unreasonable a policy which has commended itself to the Congress, and has

334 become the law of the land. *The Irrawaddy, supra,* at 193; *U. S.* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 340 (1897).

Secondly, the Both-to-Blame clause deprives the cargo owner of a portion of the proceeds resulting from the enforcement of his right to recover his entire damages from one of two joint tort-feasors. In so far as the clause has this effect it is a reasonable recognition of the realities flowing from the admiralty division of damages rule and the policy found in the statutes discussed above. By virtue of the division of damages rule, the non-carrier is in fact responsible for only 50% of the damage to cargo.
335 The clause thus results in a recovery by the cargo owner of the full amount which the law has ruled the non-carrying ship should ultimately be liable to pay, while depriving the cargo owner of a recovery for damage to cargo for which the carrier would be responsible as part of equalized collision damage, but the risk of which the statute declares should be borne by the cargo owner himself.

Admittedly, this result does some violence to the theory that each joint tort-feasor should be liable for the entire damage caused, cf. Restatement, Torts, §439, but this theory gives scant recognition to the realities of the situation under the division of damages rule. The Both-to-
336 Blame clause does recognize these realities, and I can see no basis for holding that such recognition is unreasonable.

I do not mean to be understood as saying that the rule of the *Atlas* is unreasonable, and should be rejected, nor do I reject its applicability in the absence of the situation presented to me in this case. I merely hold that the contractual device the parties have adopted is not unreasonable. In this conclusion, I am in accord with the only other judge who has passed upon the issues, see *The W. W. Bruce, supra.*

In addition, and as further indicating the reasonableness of the clause, it results in a greater certainty in the

allocation of the risks incidental to ocean navigation. It 337
also corrects the anomalous result of the operation of the *Chattahoochee* and *Atlas* rules which led shipowners "to adopt extraordinary precautions to avoid being sued in the United States and has also given rise to some remarkable efforts to gain the advantage of the American rule". Knauth, Ocean Bills of Lading, 176 (3d ed. 1947), see 176-7 for illustration.

Finally, the statutes express a legislative policy that carriers should not and that cargo owners should bear the risk of damage to cargo due to the carrier's negligent navigation by its servants. I do not see how I can in- 338
validate the contractual provision by asserting a directly contrary policy to be controlling.

I hold that the Both-to-Blame clause is reasonable, and not inconsistent with public policy, and therefore valid.

Decree in accordance with opinion.

Dated: May 9, 1950.

HAROLD R. MEDINA,
U. S. D. J.

Interlocutory Decree. 339

[SAME TITLE.]

The above entitled suit and cross-suit having come on for trial in this Court before Honorable Harold R. Medina, United States District Judge, on December 21 and 22, 1948, and January 11 and 12, 1949, and the parties having appeared by their respective counsel and having submitted a stipulation to the Court, dated February 1, 1947, providing, among other things, that the collision between M. V. "Esso Belgium" and S. S. "Nathaniel Bacon" re-

340 ferred to in the pleadings herein occurred by reason of negligence and fault in navigation on the part of both vessels, and without the act, fault or neglect of the shippers, consignees, owners or insurers of the cargo on S. S. "Nathaniel Bacon";

AND the parties hereto having agreed upon all the issues herein, except as to the right of United States of America, as owner of S. S. "Nathaniel Bacon", to recover indemnity from the respondents-impleaded

Farr Sugar Corporation
341 Schieffelin & Company
Park & Tilford Import Corporation
Standard Food Products Corporation
P. Lorillard Company, Inc.
Lamborn & Company, Inc.
American Spirits Inc.
McKesson & Robbins Inc.
Canada Dry Ginger Ale, Inc.
R. C. A. Mfg. Company
"21" Brands Inc.
H. Duys & Company, Inc.
Hamburger Bros. & Company, Inc.
342 Porcella Vincini & Company, Inc.
General Cigar Company, Inc.
Durlach Bros., Inc.
S. Ruppin Inc.
Julius Wile Sons & Company, Inc.
L. W. Minford & Company, Inc.
V. Cassazza & Bro., Inc.
Equitable Trading Corporation
Picardy Mills Inc.
Cambridge Handkerchief Works, Inc.
Lande & Miskind Inc.
David E. Schwab & Company, Inc.

Bernard Ulmann Company, Inc. 343
Joseph Love Inc.
J. Sklar Mfg. Company, Inc.
Red Star Button Company, Inc.
Tiny Town Togs Inc.
A. N. Saab Co., Inc.
Block Freres Inc.
Aris Gloves Inc.
J. H. Kimball, Inc.
David F. Schwab & Company, Inc.
J. Zurcher Company, Inc.
Nurse-Wear Hosiery Company, Inc.
Peter J. Michels Inc. 344
Guzofsky-Kalinsky Inc.
Hyman & Hyman Beauty Prod. Inc.
Arnold M. Ebbe Company, Inc.
Solex Laboratories Inc.
International General Elec. Company
The Hills Bros. Company
Porto Rican Express Company
Manhattan Shirt Company
J. Jolles Studios
I. Shalom & Company
Saxe Bendit Company
Handcraft Undergarment Company 345
General Handkerchief Company
Malina Company
F. Schumacher & Company
Miami Valley Tobacco Company
Plazuela Sugar Company
N. Y. & P. R. R. S. S. Company
Westinghouse Electric Int'l. Company
Mathieson Alkali Works Inc.
Nash-Kelvinator Company
The Frank Tea & Spice Company
I. Lewis Cigar Mfg. Company

346 Consolidated Cigar Corporation
The Virgin Islands Company
J. Stromeyer Company
Paris Beauty Supply Company
The Glemby Company, Inc.
Tin Salvage Institute
Delite Products Company
American Lady Specialties Mfg. Company
Gibbs & Company
M. B. Cohen Company
Lanza Silk Dyeing Company, Inc.
D'Angelo Silk Throwing Company
347 Brower Bros. Silk Company, Inc.
Leonard Custom Tailors Company
Lederle Laboratories Inc.
Tanners Shoe Company
Samuel & Benj. L. Grabosky (first name fictitious)
Bernard O. Clark (first name fictitious)
Kenneth Krack (first name fictitious)
Otto Muller
Ralph Williams
Gerald Udell
Mrs. Tom Ritchie
348 Walter E. Lord
Henry L. Gilgoff (first name fictitious)
Wilbur H. Holly
Robert A. Irizarry (first name fictitious)
Jose Ortiz
Margarite Jensen
Arthur E. Mann (first name fictitious)
Frank A. Delaney
Jacob Tanenbaum
Harry A. Nadler (first name fictitious)
Manuela Diaz
Joseph A. Rivera (first name fictitious)
Mrs. Daisy Terrano

Abraham Radinsky, doing business under the name Pacific Undergarment Company 349

David and Larry Kliven, doing business under the name Peerless Undergarment Company

P. E. Anderson—G. J. Briasco, doing business under the name John H. Rodriguez Company

John Bass, John B. Warnock, Theodore Mutter, doing business under the name L. W. & P. Armstrong Inc.

George, Michael, Joseph Mabarak, doing business under the name Mabarak Bros.

Julius Baer, Carl Badman, doing business under the name B. Dickson & Co. 350

Jules A. Des Angles, doing business under the name Jules A. Des Angles Co. Inc.

David A. and Selim A. Sutton, doing business under the name A. D. Sutton & Sons.

Jacob Maleh, Sam and Jack Hamway, doing business under the name Maleh & Hamway

Rudolph and Harry Attillo, Sydney de Mea, doing business under the name De Mea Bros.

Ben Guzofsky, doing business under the name Ben Gee Sales Co.

George, Elias and Ameen Bardwil, doing business under the name George E. Bardwil & Sons 351

Nathan Lachoff, doing business under the name Estelle Dress & Sportswear Co.

Juan Mas, doing business under the name J. Mas & Co.

Samuel Rochelson, David Rudolf, doing business under the name Osage Handkerchief Co.

owners of cargo laden on said S. S. "Nathaniel Bacon", by reason of the Both-to-Blame Collision Clause contained in paragraph 9 of the bills of lading covering said cargo and quoted in the impleading petition; and

Interlocutory Decree.

352 IT HAVING BEEN AGREED by the parties hereto that interest on the claims asserted by the intervening petitioners

Atlantic Mutual Insurance Company
Federal Insurance Company
Home Insurance Company
Fidelity Phenix Fire Insurance Company
Firemen's Insurance Company
Glens Falls Insurance Company
Standard Marine Insurance Company, Ltd.
St. Paul Fire & Marine Insurance Company
Queen Insurance Company of America
353 Star Insurance Company of America
Insurance Company of North America
Firemen's Fund Insurance Company
United States Fire Insurance Company
Agricultural Insurance Company
Commercial Union Assurance Company, Ltd.
Westchester Fire Insurance Company
Hanover Fire Insurance Company

insurers of cargo laden on the S. S. "Nathaniel Bacon", shall not be recoverable except from the date of the final decree herein;

354 AND it appearing that the United States of America, libellant and cross-respondent, and Belgian Overseas Transport, S. A., claimant and cross-libellant, have agreed that the damages resulting from the aforesaid collision shall, as between the said parties, be borne in the following proportions, that is, one-third by the United States of America, as owner and operator of the S. S. "Nathaniel Bacon", and two-thirds by Belgian Overseas Transport, S. A., as owner and operator of the M. V. "Esso Belgium";

AND the Court having made and filed its opinion dated May 9, 1950, sustaining the validity of the Both-to-Blame

Collision Clause and allowing to petitioner, United States of America, recoveries against the above named respondents-impleaded as prayed for, it is 355

ORDERED that the above entitled suit and cross-suit be and they hereby are consolidated under Docket No. A126-101 and the caption thereof for all future purposes; and it is

ORDERED, ADJUDGED AND DECREED, as follows:

1. The facts stated in said stipulation dated February 1, 1947, are hereby made the findings of fact, and the conclusions of law stated in said opinion dated May 9, 1950, are hereby made the conclusions of law, of this Court herein. 356

2. That the aforesaid collision between the S. S. "Nathaniel Bacon" and M. V. "Esso Belgium" occurred by reason of negligence and fault in navigation on the part of both vessels, and that the said collision and any loss or damage sustained by any of the parties hereto as a result of said collision occurred without the act, fault or neglect of the shippers, consignees, owners or insurers of cargo laden on the S. S. "Nathaniel Bacon", their agents, or their servants, and that the damages resulting from the aforesaid collision shall be borne as between the United States of America, libellant-cross-respondent, and Belgian Overseas Transport, S. A., claimant-cross-libellant, one-third by the United States of America and two-thirds by Belgian Overseas Transport, S. A. 357

3. That each of the intervening petitioners above named do have and recover from M. V. "Esso Belgium", her claimant and stipulators for value, the full amount of

its legal damages as insurer of cargo laden on S. S. "Nathaniel Bacon" resulting from the aforesaid collision, in such amount as may be determined by agreement of the parties herein or by the Commissioner hereinafter designated and by this Court, but without interest for the period prior to the entry of the final decree herein.

4. That such sums as the intervening-petitioners shall be determined to be entitled to recover from M. V. "Esso Belgium", her claimant and stipulators, be treated as part of the damages of Belgian Overseas Transport, S. A., as owner of the said vessel, and that the damages of the respective vessel owners having been determined, United States of America do have and recover of and from the M. V. "Esso Belgium", her claimant and stipulators, the amount, if any, by which two-thirds of the damages of United States of America exceed one-third of the damages of Belgian Overseas Transport, S. A. or (as the case may be) that Belgian Overseas Transport, S. A. do have and recover from United States of America the amount, if any, by which one-third of the damages of Belgian Overseas Transport, S. A. exceeds two-thirds of the damages of United States of America.

5. That United States of America, cross-respondent and petitioner, do have and recover from each of the respondents-impleaded above named, respectively, such amount as will indemnify it in respect of any amount set off, recouped or recovered by Belgian Overseas Transport, S. A., as owner of M. V. "Esso Belgium", from or against United States of America, as owner of S. S. "Nathaniel Bacon", by reason of any recovery from M. V. "Esso Belgium", her claimant or stipulators for value, on account of said collision by any of the intervening-petitioners above named as insurer of cargo laden on the

S. S. "Nathaniel Bacon" and owned by said respondent-impleaded. 361

6. This cause is hereby referred to Richard T. O'Connell, Esq., as Commissioner, to ascertain and compute the amount of the damages of the respective parties and to report thereon to this Court with all convenient speed.

New York, N. Y., August 21st, 1950.

HAROLD R. MEDINA,
U. S. D. J.

362

We hereby consent to the form of the foregoing decree and that the recovery of the libellant, or of the cross-libellant, as the case may be, and the recovery of the respective intervening-petitioners, be as set forth in this Interlocutory Decree and we waive notice of settlement thereof.

IRVING H. SAYPOL,
By EDWARD L. SMITH,
Proctor for Libellant, Cross-Respondent and Petitioner, United States of America.

363

KIRLIN CAMPBELL HICKOX & KEATING,
Proctors for Claimant and Cross-Libellant, Belgian Overseas Transport, S. A.

BIGHAM ENGLAR JONES & HOUSTON,
Proctors for Intervening-Petitioners and Respondents-Impleaded above named.

Notice of Appeal.

364

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 126-101.

UNITED STATES OF AMERICA, as owner of S. S. "NATHANIEL BACON", and as bailee of her cargo,

Libellant,

—against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc.,
365 and BELGIAN OVERSEAS TRANSPORT, S. A.

Claimant,

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,

Intervening-Petitioners.

A 126-167.

BELGIAN OVERSEAS TRANSPORT, S. A., as owner of M. V. "ESSO BELGIUM",

Cross-Libellant,

—against—

366

UNITED STATES OF AMERICA, as owner of S. S. "NATHANIEL BACON",

Cross-Respondent and Petitioner,

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., et al.,

Respondents-Impleaded.

Sirs:

PLEASE TAKE NOTICE, that Farr Sugar Corporation and American Spirits, Inc., et al., respondents impleaded,

hereby appeal to the United States Court of Appeals for 367
the Second Circuit from the interlocutory decree entered in the above entitled consolidated cause on the 11th day of September, 1950, but only in so far as said decree awards cross-respondent and petitioner, United States of America, a recovery against said respondents impleaded, Farr Sugar Corporation and American Spirits, Inc., et al., of such amount as will indemnify it in respect of any amount setoff, recouped or recovered by Belgian Overseas Transport, S. A., as owner of M. V. "Esso Belgium", from or against United States of America, as owner of S. S. "Nathaniel Bacon", by reason of any recovery from M. V. "Esso Belgium", her claimant or stipulators for 368
value on account of the collision referred to in the said decree by any of the intervening petitioners as insurers of cargo laden on the S. S. "Nathaniel Bacon" and owned by said respondents impleaded.

Dated: New York, N. Y. September 21, 1950.

Yours &c.,

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Respondents impleaded,
Office & P. O. Address, 369
99 John Street,
New York 7, N. Y.

Notice of Appeal.

370 To:

IRVING H. SAYPOL, Esq.,
U. S. Attorney,
45 Broadway, New York 6, N. Y.

and

BURLINGHAM, VEEDER, CLARK & HUPPER, Esqs.,
27 William Street, New York 5, N. Y.,
Proctors for Libellant, Cross-Respondent and
Petitioner United States of America.

371 KIRLIN, CAMPBELL, HICKOX & KEATING, Esqs.,
Proctors for Respondent and Libellant,
Belgian Overseas Transport, S. A.,
120 Broadway, New York 5, N. Y.

The foregoing appeal is hereby allowed.

Dated: New York, N. Y., September 21, 1950.

SYLVESTER J. RYAN,
U. S. D. J.

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Assignment of Errors.

373

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 126-101.

UNITED STATES OF AMERICA, as owner of S. S. "NATHANIEL BACON", and as bailee of her cargo,
Libellant,

—against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc., and BELGIAN OVERSEAS TRANSPORT, S. A.
Claimant, 374

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Intervening-Petitioners.

A 126-167.

BELGIAN OVERSEAS TRANSPORT, S. A., as owner of M. V. "ESSO BELGIUM",
Cross-Libellant,

—against—

UNITED STATES OF AMERICA, as owner of S. S. "NATHANIEL BACON",
Cross-Respondent and Petitioner, 375

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., et al.,
Respondents-Impleaded.

Farr Sugar Corporation, et al. hereby assign error to the decision and decree of the District Court in the following respects:

1. In that the District Court held that in substance the both-to-blame clause purports to absolve the shipowner from liability for negligent navigation.

Assignment of Errors.

376 2. In that the District Court held that the both-to-blame clause is not in conflict with any provision of the Carriage of Goods by Sea Act.

3. In that the District Court held that the both-to-blame clause is not in conflict with any public policy of the United States.

4. In that the District Court held that the both-to-blame clause is not unreasonable.

5. In that the District Court failed to hold that the
377 both-to-blame clause is in conflict with Section 4(3) of the Carriage of Goods by Sea Act.

6. In that the District Court failed to hold that the clause is in conflict with Section 3(8) of the Carriage of Goods by Sea Act.

7. In that the District Court failed to hold that the clause is in conflict with the public policy of the United States.

8. In that the District Court failed to hold that the
378 both-to-blame clause is unreasonable.

9. In that the District Court found that the proposal that Section 4(3) be amended in such fashion as specifically to invalidate the both-to-blame clause, was rejected by the Committee on Commerce, United States Senate, 74th Congress, 1st Session (1935) and/or by the Committee on Merchant Marine & Fisheries, House of Representatives, 74th Congress, 2nd Session (1936).

10. In that the District Court held that Section 4(3) of the Carriage of Goods by Sea Act does not invalidate the both-to-blame clause.

Assignment of Errors.

11. In that the District Court held that Section 3(8) of the Carriage of Goods by Sea Act does not invalidate the both-to-blame clause. 379

12. In that the District Court found that the clause operates to relieve the carrier from indirect liability to the cargo owners.

13. In that the District Court held that it was not unreasonable for a common carrier of goods by sea to require of a shipper as a condition of the carriage of his goods the agreement contained in the both-to-blame clause to indemnify such common carrier against his 380 liability to another vessel owner incurred by reason of his negligence.

14. In that the District Court held that the operation of long established principles of the law of admiralty relating to the division of damages between negligent shipowners results in an anomaly.

15. In that the District Court held that the both-to-blame clause results in greater certainty in the allocation of risks incidental to ocean navigation.

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16. In that the District Court held that the both-to-blame clause is reasonable, and not inconsistent with public policy, and therefore valid.

17. In that the District Court failed to hold that the both-to-blame clause is unreasonable and inconsistent with public policy and therefore void.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Respondents-Impleaded,
Office & P. O. Address,
99 John Street,
New York 7, N. Y.

Stipulation as to Exhibits.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 126-101.

UNITED STATES OF AMERICA, as owner of the S. S. "NATHANIEL BACON", and as bailee of her cargo,
Libellant,

—against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc.,
383 Respondent,

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Intervening-Petitioners.

A 126-167.

BELGIAN OVERSEAS TRANSPORT, S. A., as owner of M. V. "ESSO BELGIUM",
Libellant,

—against—

UNITED STATES OF AMERICA, as owner of the
384 S. S. "NATHANIEL BACON",
Respondent,

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., et al.,
Impleaded.

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties hereto that libellants' Exhibits 2-13 inclusive and intervenors' Exhibits A-F inclusive may be omitted from the printed record on appeal herein but may be quoted or printed in whole or in part in briefs or as appendices to briefs or may be handed up to the Court upon the argument of this appeal by any

party hereto with the same force and effect as though 385
reproduced in the record in full.

Dated: New York, N. Y., October 16, 1950.

IRVING H. SAYPOL,
U. S. Attorney.
BURLINGHAM VEEDER CLARK & HUPPEL,
Of Counsel
Proctor for Libellant and for Petitioner,
United States of America.

KIRLIN CAMPBELL HICKOX & KEATING, 386
Proctors for Claimant and Cross-Libellant,
Belgian Overseas Transport, S. A.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Intervening Petitioners
and Respondents-Impleaded.

387

388 **Stipulation as to Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 126-101.

UNITED STATES OF AMERICA, as owner of
S. S. "NATHANIEL BACON", and as bailee of her cargo,
Libellant-Appellee,

389 —against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc.;
BELGIAN OVERSEAS TRANSPORTS, S. A.,
Claimant-Appellee,

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Intervening-Petitioners-Appellants.

A 126-167.

BELGIAN OVERSEAS TRANSPORTS, S. A., as owner of
M. V. "ESSO BELGIUM",
Cross-Libellant-Appellee,

390

—against—

UNITED STATES OF AMERICA, as owner of
S. S. "NATHANIEL BACON",
Cross-Respondent and Petitioner-Appellee,

FARR SUGAR CORPORATION, AMERICAN SPIRITS INC., et al.,
Respondents-Impleaded-Appellants.

IT IS HEREBY STIPULATED AND AGREED by and between proctors for the respective parties hereto, that the fore-

going is a true transcript of the record in the District Court in this proceeding as agreed on by the parties. 391

Dated: New York, N. Y., January 22nd, 1951.

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for Intervening-Petitioners and
Respondents-Impleaded-Appellants.

IRVING H. SAYPOL,
United States Attorney.
BURLINGHAM, VEEDER, CLARK & HUPPER,
Of Counsel 392
Proctor for Libellant and Petitioner-Appellee,
United States of America.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Proctors for Claimant and Cross-Libellant-
Appellee, Belgian Overseas Transports, S. A.

393

Clerk's Certificate.

394

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

A 126-101.

UNITED STATES OF AMERICA, as owner of
S. S. "NATHANIEL BACON", and as bailee of her cargo,
Libellant-Appellee,

—against—

M. V. "ESSO BELGIUM", her engines, boilers, tackle, etc.,
395 BELGIAN OVERSEAS TRANSPORTS, S. A.,
Claimant-Appellee,

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Intervening-Petitioners-Appellants.

A 126-167.

BELGIAN OVERSEAS TRANSPORTS, S. A., as owner of
M. V. "ESSO BELGIUM",
Cross-Libellant-Appellee,

—against—

396 UNITED STATES OF AMERICA, as owner of
S. S. "NATHANIEL BACON",
Cross-Respondent and Petitioner-Appellee,

FARR SUGAR CORPORATION, AMERICAN SPIRITS INC., et al.,
Respondents-Impleaded-Appellants.

United States of America,
Southern District of New York—ss.:

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District

Clerk's Certificate.

of New York, do hereby certify that the foregoing is a 397
correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

The last day to file the Record is , 1951.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of January, in the year of our Lord one thousand nine hundred and fifty-one and of the Independence of the said United States the one hundred and seventy-fifth.

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WILLIAM V. CONNELL,
Clerk.

(Seal)

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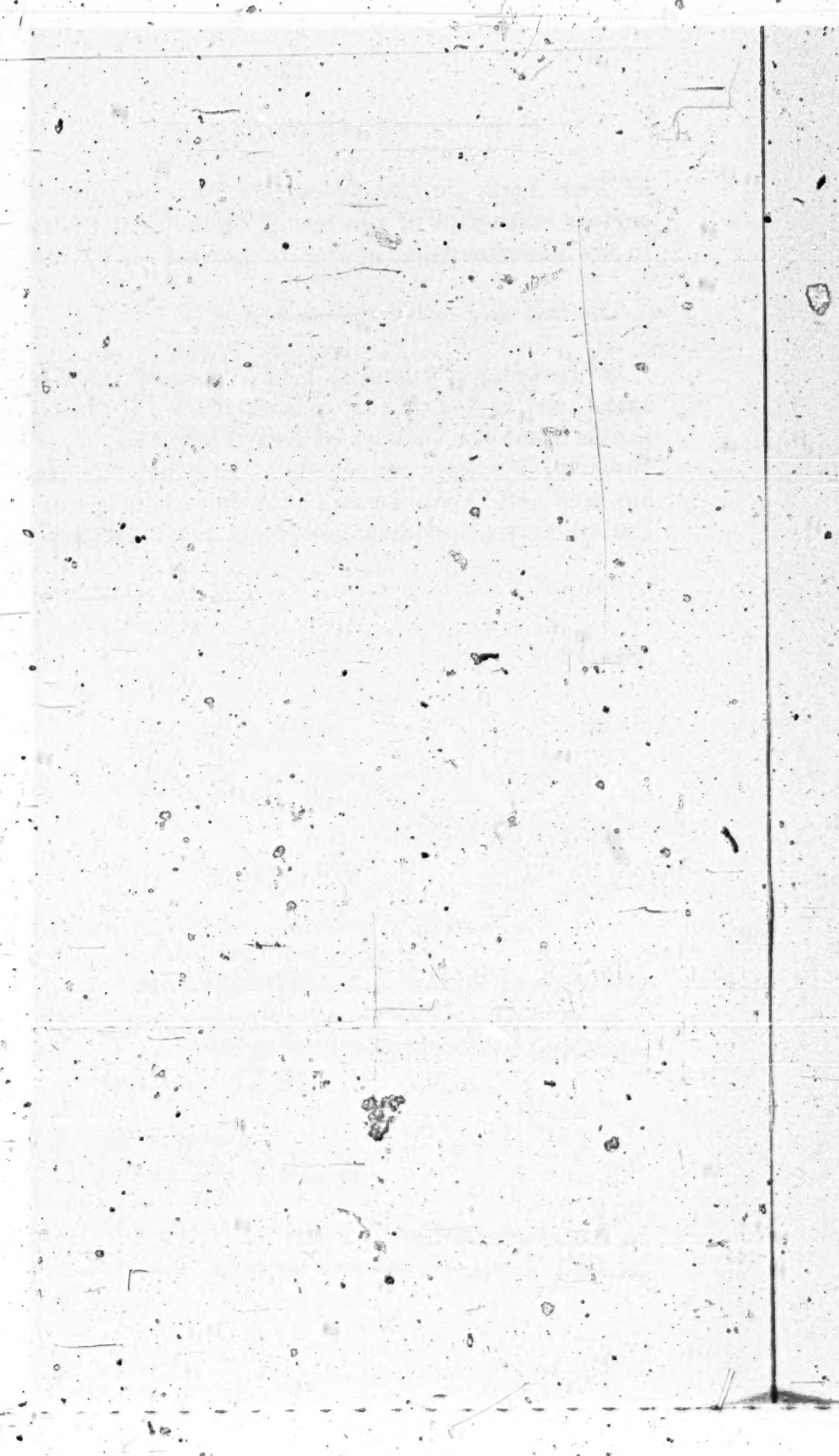

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1950

No. 252

Argued May 7, 1951. Decided August 31, 1951

Docket No. 21990

UNITED STATES OF AMERICA, LIBELLANT-APPELLEE

v.

FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL., RESPONDENTS-IMPLEADED-APPELLANTS.

Before: SWAN, AUGUSTUS N. HAND and CLARK, *Circuit Judges*

Appeal from the United States District Court for the Southern District of New York

Cross-libels by United States of America, as owner of S.S. "Nathaniel Bacon," and Belgian Overseas Transport, S. A., as owner of M. V. "Esso Belgium," to recover respectively for damages resulting from a collision of the two vessels, wherein Farr Sugar Corporation, American Spirits Inc., and others, cargo owners or their representatives, were impleaded or intervened. From an interlocutory decree in the consolidated action settling the respective rights of the parties and holding the impleaded respondents liable over to indemnify the United States of America under a "Both-to-Blame" clause of their bills of lading, D. C. S. D. N. Y., 90 F. Supp. 836, these respondents appeal. Reversed.

Leonard J. Matteson of New York City (*Bigham, Englar, Jones & Houston, Oscar R. Houston* and *Richard F. Shaw*, all of New York City, on the brief), for appellants Farr Sugar Corporation and American Spirits, Inc.

Roscoe H. Hupper, of New York City (*Irving H. Saypol*, U. S. Atty., *Burlingham, Veeder, Clark & Hupper* and *Benjamin E. Haller*, all of New York City, on the brief), for the United States, appellee.

Cletus Keating, of New York City (*Kirlin, Campbell & Keating, Edwin S. Murphy* and *Louis J. Gusmano*, all of New York City, on the brief), for Belgian Overseas Transport, S. A., claimant-libellant.

CLARK, *Circuit Judge:*

This appeal presents only a single legal issue, but a vastly important one in its effect on seagoing commerce and the carriage of

goods by ships. It is the validity of the "Both-to-Blame" collision clause now commonly inserted in ocean carriers' bills of lading. As is now well known, federal legislation has relieved shipping of the ancient insurer's liability toward cargo and even of its responsibility for negligent navigation; but Supreme Court decisions have held that cargo may recover in full against a non-carrying ship negligently in collision with its carrier, and that the non-carrier may recover in part, under the rule of divided damages, from the also negligent carrier. To correct this asserted "anomaly" the shipowners devised the clause in question, which requires the cargo to return to its carrier the amounts thus "received indirectly." Cargo owners maintain that such a provision violates both the long-standing admiralty and common-law prohibitions against carrier limitations of liability and also specific prohibitions of the federal statutes; while shipowners contend that the clause is in aid of the public policy expressed in the legislation, and merely corrects a manifest paradox.

Such is the background of this case, which arose specifically when the S. S. Nathaniel Bacon, owned by the United States, collided in New York Harbor on November 24, 1942, with the M. V. Esso Belgium, owned by Belgian Overseas Transport, S. A. Both the vessels and the cargo, which was aboard the "Nathaniel Bacon," thereby sustained damage. After the shipownes instituted libels, cargo owners were impleaded in one; and, in the other, insurance companies which had paid for the cargo losses intervened. The parties have stipulated that both vessels were at fault, and that the damage should be divided here one-third against the United States as owner of the "Nathaniel Bacon" and two-thirds against the "Esso Belgium's" owner. The libels were consolidated and the only matter remaining in dispute, before the entry of an interlocutory decree was the claim for indemnity made by the United States against the cargo owners under the "Both-to-Blame" clause in the bills of lading.[1] The district court held the clause valid, 90 F. Supp. 836, and its interlocutory decree was therefore framed to provide for ultimate indemnity to the United States of any amounts decreed in favor of

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[1] Paragraph 9 of the bills of lading is as follows:

"If the ship comes in collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the

cargo owners from the "Esso Belgium" and in turn recovered by the latter from the United States. From this decree the cargo owners have appealed.

Quite probably a court has no more delicate problem placed before it than that of deciding whether to fill in an asserted gap in remedial legislation. Surely a court is under some obligation to see that hard-won reforms are workable as the legislature has intended, or, perhaps, would have intended had the specific problem been foreseen. On the other hand, since so much of legislative change is a product of compromise, of the ameliorative and abrasive effects of various pressures, care must be taken lest what is lost in the legislative halls be granted by courts in the guise of "interpretation." No general guide can be stated; in is always a question of how much and how far. Here Judge Medina in the court below was persuaded that an undesired gap existed and ought to be closed—or rather that the shipowners should not be forbidden to close it. There is no doubt that he has stated a persuasive case demonstrating how, under existing law in the absence of the clause, the shippers may recover 100 per cent of their loss when they can trace it back to two negligent navigators rather than simply to one; and he finds a useful analogy in the accepted validity of the "Jason clause" with respect to general average, hereinafter discussed. The question is obviously one of difficulty and no sure answer can be expected until the Supreme Court has passed upon the matter. But on balance we think the decision goes too far; it allows the carriers to be legislators beyond present justification.

The able arguments in this case went into details as to the back-

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other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

"The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact."

This is the form of the "Both-to-Blame" clause which has been in use in the North Atlantic Freight Conference since Sept. 1, 1937. Robinson, Admiralty 872, 873, 1939; Knauth, Ocean Bills of Lading 95, 136, 175, 3d Ed. 1947. An earlier form in use before the passage of the Carriage of Goods by Sea Act in 1936 (see Knauth, *op. cit., supra,* at 254) was upheld in *The W. W. Bruce,* D. C. E. D. N. Y., 14 F. Supp. 894; but on appeal the court found that seaworthiness of the vessel in all respects had not been proven, thus rendering it unnecessary to consider "the much debated legal question as to the validity of the both-to-blame collision clause." 2 Cir., 94 F. 2d 834, 837, certiorari denied *Pacific-Atlantic S. S. Co.* v. *Weyerhaeuser Timber Co.,* 304 U. S. 567.

ground and specific content of the legislative enactments. These we shall examine. But before we do so, we may state certain general conclusions. First, the correction of the "anomaly" must often be at most a rough and perhaps uncertain approximation of justice. The formal necessity of three successive suits pressed to conclusion—except as consolidation may somewhat lessen the duplication—makes for uncertainty at the outset; jurisdiction may not be freely obtainable in each instance, and the suits, for lack of legal right or perhaps inclination or determination, may stop before justice is fully assuaged. Then the non-carrier may be in a position to seek a limitation of its liability and may choose to do so. This can lead to various strange situations where advantages and disadvantages to shipper and carrier may turn upon a third party's legal position or choice as to such limitation.[2] Moreover, the American rule of divided, rather than proportionate, damages may seem as unfair in this connection as it has in others; had the parties not stipulated in our present case, we might well have had a situation where the cargo owners found themselves cut down to half recovery, although one navigator, on the parties' own premise, was twice as negligent as the other. Of course rough justice may be better than none; on the other hand, the role of *deus ex machina* is not lightly to be assumed by one who lacks official standing for the role.

Second, the prohibition against special contracts limiting liability is one of great strength in our law and survives all but definite and clear restrictions or limitations upon it authorized by the Congress itself. This we point out in some detail below.

Third, the clause in question patently overturns settled principles of our law which have long been the subject of discussion in learned

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[2] For example, the operation of the rule that a negligent shipowner may not share equally with an innocent cargo owner in the distribution of the limitation fund of a third party. *The George W. Roby*, 6 Cir., 111 F. 601, 614-621, certiorari denied *Lakeland Transp. Co.* v. *Miller*, 183 U. S. 699; *Petition of Socony Vacuum Transp. Co.*, D. C. S. D. N. Y., 93 F. Supp. 718, 739, could mean that the cargo claims would exhaust the fund. Counsel suggests that since there is then no recoupment by the non-carrier there remains no possibility of liability for indemnity by the cargo. Quite possibly this is so. But could it not be reasonably claimed that cargo should repay which it has prevented its carrier from recovering?

Other anomalous results depending on the non-carrier's limitation of liability will readily come to mind. Certainly that possibility is suggested by the view of the court below, D. C. S. D. N. Y., 90 F. Supp. 836, 842, as to "the realities of the situation under the division of damages rule" where "the non-carrier is in fact responsible for only 50% of the damage to cargo."

articles and treatises, in the halls of Congress, and in conferences and conventions with other countries. Two such settled principles are the particular subject of sustained and vigorous attack by the shipowners here, as their position necessarily demands; namely, the rule allowing cargo to recover *in solido* for its full damage against the negligent non-carrier, and the rule in turn allowing the non-carrier to include sums so paid cargo as part of its damage in seeking divided damages against the negligent carrier. These rules, it is true, were expounded by the Supreme Court rather than set by Act of Congress; but they have been well settled for more than half a century, have acquired staunch support, and have survived severe attack aimed at legislative change. The shipowners asserted that the clause in question corrects an unfortunate rule peculiar to the United States; as the "Esso Belgium's" brief puts it: "The Both-to-Blame Clause accomplishes by agreement, in the United States, a somewhat similar distribution of cargo loss which is [sic] accomplished by the Collision Convention of 1910 in practically every other maritime country of the world."[3] This appears, on its face, at least, to be a powerful argument in favor of change in the American rule; but the greater the stress upon this argument, the more surely would it seem to follow that correction is for Congress rather than the courts.

One other fact requires special note. The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, of which this clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441; *Inman* v. *South Carolina R. Co.*, 129 U. S. 128, 139; *Santa Fé, P. & P. R. Co.* v. *Grant*

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[3] The Brussels Collision Convention of 1910, 6 Benedict on Admiralty 3-7, 6th Ed. 1941, was never ratified by the United States Senate, although it remained pending from its submission to the Senate in 1937 until its withdrawal by the President in 1947; and the Senate Committee on Foreign Relations, after conducting hearings in 1938, reported favorably on it in 1939. 6 Benedict, *loc. cit.* and 1951 Supp. 3. The Maritime Law Association seems consistently to have opposed ratification, see Doc. 310, April 1947, and Doc. 311, May 1947; and we find in the record a strong letter in opposition from John M. Woolsey to the Assistant Secretary of Commerce under date of Feb. 14, 1928.

Bros. Const. Co., 228 U. S. 177, 184, 185. Hence so definite a relinquishment of what the law gives the cargo as is found here can hardly be found reasonable without direct authorization of law. Actually the shippers, through official bodies, appear to have registered their opposition where they could and successfully at that, *viz.*, in the halls of legislation.[4]

We now turn directly to the legislative background. Prior to the passage of the Harter Act in 1893, it was said: "By the settled law, in the absence of some valid agreement to the contrary the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies. Molloy, De Jure Maràtimo, bk. 2, chap. 2, §2; Bacon, Abr. 'Carrier.' A; *Barclay* v. *Cuculla y Gana*, 3 Dougl. K. B. 389; 2 Kent, Com. 598, 599; Story, Bailm. §501; *The Niagara* v. *Cordes*, 21 How. 7, 23, 16 L. Ed. 41, 46; *The Lady Pike (Germania Ins. Co.* v. *The Lady Pike)*, 21 Wall. 1, 14, 22 L. Ed. 499, 503." *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, *supra*, 129 U. S. 397, 437, approved in *Jahn* v. *The Folmina*, 212 U. S. 354, 361, 15 Ann. Cas. 748. See also *The Delaware*, 14 Wall. 579, 596, 597; *The Maggie Hammond*, 9 Wall. 435, 444; *Clark* v. *Barnwell*, 12 How. 272, 280, 281. The courts were not at all disposed to reduce this responsibility; case after case rings the changes on this principle in various forms.[5]

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[4] Counsel suggest that shippers are actually not harmed, since they are protected by insurance, and that this is really a contest between insurance underwriters, the cargo underwriters on the one hand and the P. and I. underwriters for the shipowners on the other. We have had like intimations, without exact knowledge, in other cases, so much so that a good share of admiralty litigation might well seem only a contest among insurers; perhaps ignorance of the facts of admiralty life is a blessing in allowing federal judges to keep on working without realizing how futile their labors may be. But beyond such compulsions to continue in pursuit of justice and truth, it would seem that our problem would have more significance than some others. For (1) if ever there may be unsophisticated strays among admiralty litigants, it would seem that they must be among shippers, not all of whom will know all the rules; (2) the objective of federal legisation to provide a code of principles and to outlaw special provisions to be feared and guarded against seems a worthy one; and (3) shifting the burden of insurance costs should not be left to the control and choice of the one group which is seeking to avoid the burden.

[5] See, e.g., *Santa Fé, P. & P. R. Co.* v. *Grant Bros. Const. Co.*, 228 U. S. 177; *The Irrawaddy*, 171 U. S. 187, 189, 190. Moreover, where goods were received aboard in good order and later damaged, it was

Moreover, the scope of operation of "some valid agreement to the contrary" was strictly limited. The rule was thus stated by Mr. Justice White in *The Kensington*, 183 U. S. 263, 268: "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of *Baltimore & O. S. W. R. Co.* v. *Voigt*, 176 U. S. 498, 505, 507, 20 S. Ct. 385, 44 L. Ed. 560, 565 and *Knott* v. *Botany Worsted Mills*, 179 U. S. 69, 71, 21 S. Ct. 30, 45 L. Ed. 90, 93, where the previously adjudged cases are referred to, and the principles by them expounded are restated." So also it was said in *The Jason*, 225 U. S. 32, 49: "Prior to the Harter Act it was established that a common carrier by sea could not, by any agreement in the bill of lading, exempt himself from responding to the owner of cargo for damages arising from the negligence of the master or crew of the vessel. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co. (The Montana)*, 129 U. S. 398, 438, 9 S. Ct. 469, 32 L. Ed. 788, 791; following *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357, 21 L. Ed. 627."

The Harter Act, passed in 1893, 27 Stat. 445, 46 U. S. C. §§190-195, definitively outlawed clauses or covenants of the bill of lading relieving the vessel's owners or agents from negligence in the care and delivery of cargo or from any obligation to exercise due diligence to make the ship seaworthy; it also, and most importantly, relieved the vessel of liability for losses from faults or errors in navigation or dangers of the sea in general if such diligence was exercised. *The Delaware*, 161 U. S. 459, 471, 472; see L. Hand, *J.* concurring in

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the carrier's burden to show that the damage or loss was occasioned by one of the excepted causes, if any, contained in the bill of lading. *Jahn* v. *The Folmina*, 212 U. S. 354, 15 Ann. Cas. 748; *Clark* v. *Barnwell*, 12 How. 272. Even this was not all: the carrier had to provide a seaworthy ship, and his warranty to do so was "absolute" and did not "depend on his knowledge or ignorance, his care or negligence." *The Caledonia*, C. C. Mass., 43 F. 681, 685, affirmed 157 U. S. 124, approved in *The Edwin I. Morrison*, 153 U. S. 199, 210; *Martin* v. *The Southwark*, 191 U. S. 1, 6. He also had the burden of showing that his ship was seaworthy at the beginning of the voyage. *Jahn* v. *The Folmina*, *supra*, 212 U. S. at 361-363; *Martin* v. *The Southwark*, *supra*, 191 U. S. at 15, 16; *The Edwin I. Morrison*, *supra*, 153 U. S. at 211. In sum the carrier had not only a very heavy responsibility to his cargo, but also a stiff burden to show that he had discharged that responsibility.

American Mut. Liability Ins. Co. v. *Matthews*, 2 Cir., 182 F. 2d 322, 325, 326. The conditional release from liability for negligence was contained in §3 of the Act, 46 U. S. C. §192, set forth in full in the footnote.[6] The interpretation of this provision restricting the exemption to suits brought directly by or on behalf of cargo owners, made in 1899, in *The Chattahoochee*, 173 U. S. 540, provides the underlying legal principle which the Both-to-Blame clause is designed to overturn. We must therefore examine its development even though the controlling statute here is the Carriage of Goods by Sea Act of 1936 which was incorporated into the bills of lading. 46 U. S. C. §1312. But the latter Act carries on the policy of the earlier statute, removing, however, the condition of due diligence for the exemption from liability of the carrier or ship for "act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." 46 U. S. C. §1304(2)(a).[7] It also contained a prohibition against clauses lessening liability other than as provided in the Act. 46 U. S. C. §1303(8), discussed below.

It had long been settled that cargo owners could recover in full from a negligent non-carrier in collision with an equally negligent tug which was towing the cargo. *The Atlas*, 93 U. S. 302, 315, reversing the Circuit Court which had held on authority of *The Milan*, 1 Lush. 388, that recovery could be only in proportion to the total negligence—one-half the total loss under the American rule of divided damages. In his opinion Mr. Justice Clifford said: "Noth-

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[6] "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." §3, 46 U. S. C. §192.

[7] The carrier continues to have a duty to exercise due diligence to make the ship seaworthy and to properly man, equip, and supply it, 46 U. S. C. § 1303(1); for loss proximately resulting from his failure to do so, he is held liable. Robinson, Admiralty, 503, 507-513, 1939; Knauth, Ocean Bills of Lading, 135, 136, 3d Ed. 1947.

ing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss."

A next step is that where the owner of goods damaged in a collision involving two negligent vessels does sue the non-carrying vessel and recovers his damages, then the amount paid by the non-carrying vessel becomes part of its own "damages" when the two vessels come to assess their own liability for the collision against each other. Mr. Justice Holmes has stated the principle thus clearly in *Erie R. Co.* v. *Erie & W. Transp. Co.*, 204 U. S. 220, 226: "And it is established, as it logically follows, that the division of damages extends to what one of the parties pays to the owners of cargo on board the other. *The Chattahoochee*, 173 U. S. 540, 19 S. Ct. 491, 43 L. Ed. 801. The right to the division of the latter element does not stand on subrogation, but arises directly from the tort." See also *The Cockatoo*, 2 Cir., 61 F. 2d 889, 891, 892, certiorari denied *Howard* v. *Randall & McAllister*, 287 U. S. 669; and compare *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394, 404.

Appellants have naturally stressed the point here settled that recovery of divided damages is the ship's own right arising from the tort and not a recovery in the right of the cargo. But the damages suffered by the cargo do thus help to determine the amount of recovery by the non-carrier and in this way can be said to be "indirectly" recovered from the carrier. For the non-carrier's damages when ascertained are treated in accordance with the American rule that where two ships are involved in a collision, and both are at fault, the less heavily damaged ship is to pay to the other one-half the difference between the amount of damage suffered by the more heavily damaged ship and that suffered by the one less heavily damaged. This rule appears to date from *The Catharine*, 17 How. 170, 177, 178. It grew old early and is now thoroughly settled. *The James Gray* v. *The John Fraser*, 21 How. 184, 194, 195; *The Maria Martin*, 12 Wall. 31, 42, 43; *The Continental*, 14 Wall. 345, 361; *The Sunnyside*, 91 U. S. 208, 215; *The America*, 92 U. S. 432, 438; *The Potomac*, 105 U. S. 630, 631; *The North Star*, 106 U. S. 17, 22. Though this court, along with others, has from time to time expressed discontent at the American refusal to follow the rule of proportionate division according to the degree of fault now general in the maritime world since the International Convention of 1910, this is obviously a matter of policy for Congress. See Robinson, Admiralty 855, 856-859, 1939.

The final step, settled by *The Chattahoochee*, *supra*, 173 U. S. 540, 555, was that the exemption from direct responsibility of the vessel to cargo granted by the Harter Act did not prevent these successive

recoveries, first by cargo against the non-carrier and second by the latter in part against the carrier. In that case the schooner Golden Rule collided with the steamship Chattahoochee and was totally lost with all her cargo. The steamship was uninjured. Libellants, acting (a) as bailees of the cargo, suing on its behalf, and (b) as owners of the schooner, then sued the steamship for all losses incurred. Both ships were found to be at fault. Holding that cargo must be paid in full, the Court then allowed the steamer to recoup from the schooner one-half of this amount so that its ultimate liability was found by deducting half the value of the cargo from half the value of the sunken schooner. The Court said explicitly that "the relations of the two colliding vessels to each other remain unaffected by this act, notwithstanding one or both of such vessels be laden with a cargo."

Whether or not this case is as definitely erroneous as the shipowners here and others have thought, it would appear to have been thoroughly considered. The arguments of counsel indicate that the views later advanced in criticism were then presented, the opinion shows care, and two justices dissented, albeit without opinion. Moreover, the reasoning of the decision is logical against the American background. Of course it does indicate that the Court was not disposed to lessen the old rigorous obligations of a common carrier without quite clear authority from Congress. The opinion relies on cases which had tended to restrict carriers' advantages and shows that the Court wished to mark a clear separation between the rule for division of damages applicable between ships and other rules which were fashioned for the carriers' benefit. In *The Delaware*, *supra*, 161 U. S. 459, 471, 472, where no question of cargo was involved, a shipowner had urged that the first part of § 3 of the Harter Act absolved him from liability toward another ship for collision damage resulting from his negligent navigation. This construction of the Act was rejected by the Court because it was obvious in the light of the legislative history that the Act was intended to be applied only as between carrier and cargo and had nothing to do with liability between ships. After reciting the evils which the Harter Act was designed to overcome, the Court said: "The act was an outgrowth of attempts, made in recent years, to limit as far as possible the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, and negligence in navigation, and other forms of liability which had been held by the courts of England, if not of this country, to be valid as contracts and to be respected even when they exempted the ship from the consequences of her own negligence." In that case, too, it is clear that the Court disapproved vigorously of the shipowners' practices which led to the enactment of the Harter Act, and that it did not want the carriers' liability to be "frittered away." So it is

not surprising to find the Court saying in *The Chattahoochee, supra*, 173 U. S. 540, 555: "This is in effect extending the doctrine of the *Delaware* case, wherein the question of liability for the loss of the cargo was not an issue, to one where the vessel suffering the greater injury is also the carrier of a cargo—in other words, if the Harter act was not intended to increase the liability of one vessel toward the other in a collision case, the relations of the two colliding vessels to each other remain unaffected by this act, notwithstanding one or both of such vessels be laden with a cargo."

Similar indications are also to be found in *The North Star, supra*, 106 U. S. 17, where cargo was not involved, but it was held that where two vessels collided, and both were at fault, the one which was sunken and totally lost could not have limitation of liability until *after* the balance of damages had been struck between the two vessels. Thus the Court's view clearly was that striking the balance of damages between the two vessels was a process independent of other liabilities or the limitation of them. We agree therefore with the recent statement of this court in *American Mut. Liability Ins. Co. v. Matthews, supra*, 2 Cir., 182 F. 2d 322, 324, that "The Harter Act was not intended to affect the liability of one vessel to the other in a collision case."[8] Or as Judge L. Hand said concurring, 182 F. 2d at 326: "Thus, the effect of the doctrine of *The Chattahoochee, supra*, was that the sum of these changes in the owner's duties was not enough to justify extending the release beyond direct claims of shippers." Since, as Judge Medina pointed out, the Carriage of Goods By Sea Act admittedly was designed to continue the public policy of the Harter Act, except for the modification as to the due diligence prerequisite (Knauth, Ocean Bills of Lading 135, 3d Ed. 1947; Robinson, Admiralty 503, 506, 1939), the American policy seems quite clear. It is against the modification sought to be made by the Both-to-Blame clause; the attempt to push the policy of the legislation to a point where it has definitely not gone is in itself legislation.[9]

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[8] This appears to have been also the view of distinguished experts; thus see Mr. Charles C. Burlingham testifying for the Brussels Collision Convention, *supra* note 3, but conceding that "the policy of the United States is shown not only in the Harter Act, but in the interpretations of the Harter Act, and I suppose that the Chattahoochee is a part of the policy of the United States at this moment, until it is changed." Hearings on Brussels Collision Convention, 1910, before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, 75th Cong., 2d Sess. 72, Jan. 10-14, 1938.

[9] The "Both-to-Blame" clause was specifically before Congress in its consideration of this Act. One representative of shippers proposed that it be specifically invalidated by amendment added to

There remains the issue whether by other provisions of the statutes in question authorization of special contracts of this nature can be spelled out. In the light of this background it seems clear that such authorization must be clear, for otherwise the old prohibitions against contracts cutting down shippers' rights must still prevail. The question here would seem answered by the parties by their very acts showing that such authorization is not clear, for they draw different conclusions from the same provision of the governing Act. Sec. 3(8) of the Carriage of Goods by Sea Act, 46 U. S. C. §1303(8), provides: "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter or section 25 of Title 49, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability." Here the position of the parties may appear somewhat reversed, cargo claiming that this language reaches the liability here, while the shipowners assert that it does not invalidate agreements concerning liability of a carrier, as it may be assessed in accordance with the principles of the divided damage rule. But at least it is additional evidence that Congress meant to grant the carriers only whatever benefits were explicitly set out in the legisla-

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§4(3), 46 U. S. C. §1304(3); but other shippers' representatives thought a specific prohibition unnecessary and were unwilling to jeopardize the main bill by pressing for it. Hearings before Committee on Commerce, U. S. Senate, on S. 1152, A Bill Relating to Carriage of Goods by Sea, 74th Cong., 1st Sess., 51-59, May 10, 1935; Hearings before Committee on Merchant Marine and Fisheries, House of Representatives, on S. 1152, 74th Cong., 2d Sess. 49-53, Jan. 26, 1936. The parties naturally draw diverse interpretations from this history. On the direct point it appears inconclusive, though the absence of any change of general policy in the Act as a whole remains clear.

The parties are also in disagreement as to the meaning of §4(3) as enacted, 46 U. S. C. §1304(3), reading: "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants." Appellants say that this was specifically directed to the outlawing of any attempts to put responsibility upon the shipper other than as defined by the Act itself, while the shipowners say that this applies only to loss or damage caused by cargo and was intended to restate existing law. In the view we take of the general provisions of the law, we need not attempt to resolve the ambiguity existing as to this specific provision.

tion. It is therefore consistent with our conclusion drawn from the general features of the Act itself.

Both the shipowners and the District Court rely heavily on the decision and principle established in *The Jason, supra*, 225 U. S. 32. There the principal question was whether a shipowner could enforce a clause in the bill of lading which required cargo owners to contribute to general average for sacrifices and expenditures incurred in a successful effort to save a negligently stranded vessel and her cargo. The issue arose because of the ruling in *The Irrawaddy*, 171 U. S. 187, to the effect that §3 of the Harter Act did not by itself change the previous law, *Ralli* v. *Troop*, 157 U. S. 386, refusing the shipowner a right to enforce contributions to general average where his own negligent navigation had made the sacrifice necessary. *The Jason* held that by contract the cargo owner *could* waive the defense available to him under the *Irrawaddy* rule; *i.e.*, the clause in the bill of lading was upheld, and the cargo owners forced to contribute. So the "Jason clause" has now become a usual part of ocean bills of lading and is recognized in the Carriage of Goods by Sea Act. §5, 46 U. S. C. §1305, last sentence.

Like all analogies, the persuasiveness of this precedent depends upon its closeness to our case. We do not think it persuasively close; it deals with a situation which—in analysis and in fact—is not to be approached as a restriction of the rights of cargo as our present agreement so clearly is. This is well pointed out by Judge Chase in *The Toluma*, 2 Cir., 72 F. 2d 690, 693, thus: "This Jason clause is not in any real sense a diminution of the rights cargo would otherwise have. On the contrary, it enables cargo to have the master as its agent at the time and place of the peril to act for it to make such sacrifices as may be timely and effective to avoid greater loss. And to secure that right, cargo agrees to contribute in general average though the Harter Act would otherwise excuse it from so doing." And when this decision was affirmed by a unanimous Court in *Aktieselskabet Ozco* v. *The Sucarseco, supra*, 294 U. S. 394, 403, Chief Justice Hughes expressed the same thought when he said that "the effect of the 'Jason clause' is to invest the master with authority and responsibility to act directly for cargo in relation to cargo's duty to contribute in general average. The master becomes for that purpose the representative of cargo." And he added: "The 'Jason clause' was sustained because it admitted the shipowner to share in general average only in circumstances where by the Harter Act he was relieved from responsibility." As is obvious, the present Act, too, does not outlaw all contracts between shipper and carrier; it strikes down only those limiting the shipper's rights. Hence the Jason clause escapes the prohibition; the Both-to-Blame clause cannot.

We conclude that the Both-to-Blame clause cannot be upheld and the interlocutory decree must be revised to eliminate the provision

for indemnity to the United States under it. Reversed. Since the appeal attacked only this portion of the decree, the latter of course stands in all other particulars.

AUGUSTUS N. HAND, *Circuit Judge* (dissenting):

I dissent on the ground that I regard the "Both-to-Blame" clause valid for the reasons stated by Judge Medina in the court below.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of August one thousand nine hundred and fifty-one.

Present: HON. THOMAS W. SWAN, *Chief Judge;* HON. AUGUSTUS N. HAND, HON. CHARLES E. CLARK, *Circuit Judges*

UNITED STATES, AS OWNER, ETC., LIBELLANT-APPELLEE

v.

M/V ESSO BELGIUM, ETC., CLAIMANT-APPELLEE
ATLANTIC MUTUAL INS. CO., ET AL., INTERVENING-PETITIONERS-APPELLANTS

BELGIAN OVERSEAS TRANSPORTS, AS OWNER, ETC., CROSS-LIBELLANT-APPELLEE

v.

UNITED STATES, AS OWNER, ETC., PETITIONER-APPELLEE
ET AL.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs and cause remanded to revise the interlocutory decree in accordance with the opinion of this court.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

By A. DANIEL FUSARO,
Deputy Clerk.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 154, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States of America, as owner, etc., Libellant-Appellee, v. M. V. Esso Belgium, etc., Claimant-Appellee, Atlantic Mutual Insurance Company, etc., Intervening-Petitioners-Appellants; Belgian Overseas Transports, S.A., etc., Cross-Libellant-Appellee, v. United States of America, etc., Cross-Libellant-Appellee; Farr Sugar Corp., etc., Respondent-Impleaded-Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of October in the year of our Lord one thousand nine hundred and fifty-one, and of the Independence of the said United States the one hundred and seventy-sixth.

[SEAL.]

(S.) ALEXANDER M. BELL,
Clerk.

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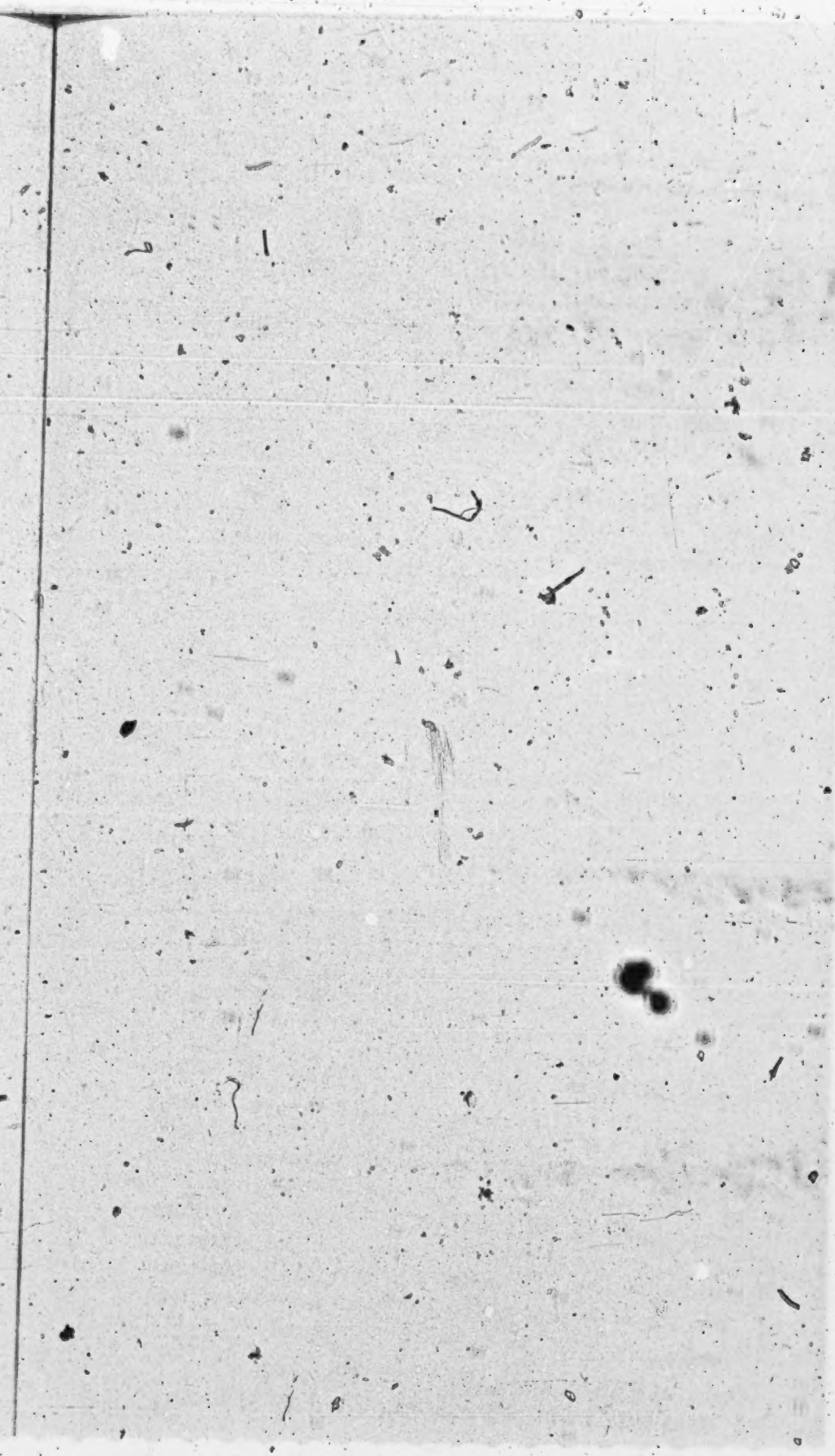

Supreme Court of the United States

No. 450, October Term, 1951

[Title omitted.]

Order allowing certiorari

(Filed January 14, 1952)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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